Drafting FEDERAL LAW

OFFICE OF THE GENERAL COUNSEL, LEGISLATION DIVISION

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This book is dedicated, with respect and affection, to Theodore Ellenbogen, the most meticulous of legislative draftsmen, who taught me the craft.

READEX FICHE

FOREWORD

Much of this textbook was originally prepared for use in a legislative drafting seminar, the idea for which derived from Appendix D of Reed Dickerson's *The Fundamentals of Legal Drafting* (Little, Brown & Co. 1965). The seminar's purpose was to train program lawyers of what used to be the Department of Health, Education, and Welfare, so that under the guidance of experienced legislative draftsmen they could help write the bills, in the areas of their counseling experience, for HEW's annual legislative program.

The best and possibly the only way to learn how to draft a bill is by trying to draft one. Most professional draftsmen wrote their first bills during an apprenticeship in which they learned largely by trial and error. But apprenticeships are time-consuming and labor-intensive. HEW's drafting seminar was an experiment in simulating the apprenticeship for a small group, no more than a dozen. It concentrated the experience into 16 sessions, of 2½ hours each, spread over 8 weeks.

The seminar's success encouraged me to complete the book for use by students both in future seminars and independent study. Although many of its examples and exercises are drawn from regulatory statutes, the book's focus remains on federal grant-in-aid legislation.

My thanks to the members of the Legislation Division of the Department of Health and Human Services, particularly my deputy, Frances White, and to the former chief of the predecessor HEW Division, Sidney A. Saperstein, for many helpful ideas. I am grateful to my colleague, Leslie A. Platt, now an HHS Deputy General Counsel, who drew on his extensive former experience as HUD's Associate General Counsel for Legislation for a number of useful suggestions. Thanks, also, to Sally Davies of the Department's income security policy staff for doing the computational work that resulted in Appendix B.

My deepest gratitude, however, must be reserved for Victor Zafra, who edited the text and suppressed my windier sentences, and for my secretary, Evelyn Jimenez, who managed to remain cheerful despite what must have seemed the endless job of typing and retyping the manuscript.

DONALD HIRSCH
August, 1980

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CHAPTER ONE

An Approach to Legislative Specifications

§1.1 *An overview.* Many years ago, during the course of a third-year law school seminar in the taxation of corporation reorganizations, our professor commended to us what he called the most amusing opinion he had ever read in a field, as he put it, "that does not abound in humor." The opinion turned out to be a hopelessly confused judicial decision in which an eminent jurist demonstrated his total incomprehension of the purpose and operation of the tax treatment of certain corporate transactions.

In retrospect, I no longer find it diverting that a scholarly judge of high intelligence, writing after careful study and much concentration, cannot make sense out of the statutory expression of the rules governing certain conduct. The growing impenetrability of much federal legislation is not wholly, or even primarily, caused by its draftsmen. It mirrors the increasingly complicated ways in which government intervenes in private and public activity that itself continues to gain in sophistication.

In the face of this ever-burgeoning complexity, the draftsman has a very special responsibility. It is the legal analog of the Hippocratic injunction on the practice of medicine: First, do no harm. It may be stated as follows: Let's not make things more complicated than they have to be. This is not as novel an idea as it may appear. In 1817, Thomas Jefferson wrote to a Mr. Cabell:

> I should apologise perhaps for the style of this bill. I dislike the verbose & intricate style of the modern English statutes, and in our revised code I endeavored to restore it to the simple one of the antient statutes, in such original bills as I drew in that work. I suppose the reformation has not been acceptable, as it has been little followed. You however can easily correct this bill to the taste of my brother lawyers by making every other word a 'said' or 'aforesaid,' and saying every thing over 2. or 3. times, so as that nobody but we of the craft can untwist the diction, and find out what it means; and that too not so plainly but that we may conscientiously divide, one half on each side.

Since Jefferson's time, the draftsman's passion for the turgid and redundant has somewhat abated. Today, it is not the abundance of whereas's and aforesaid's that interfere with the intelligibility of so many of our statutes. Instead, it is the poorly organized, convoluted, or otherwise slovenly treatment of statutory concepts that demand precision.

This text will not solve that problem; it cannot by itself turn a law student or a lawyer into a legislative draftsman. If you are willing to devote the time needed to read it with care and do the assigned exercises, if possible under the guidance of an experienced draftsman, you will nevertheless be on the way to solving the problem for yourself in your own work.

We will study legislative drafting from the perspective of a draftsman for a federal agency. Virtually all major programs of federal financial assistance, and most of the significant regulatory statutes, have in their ancestries a proposal made to Congress by an executive agency, customarily in the form of a draft bill. Generally speaking, these proposals are developed with greater formality than bills written within Congress. In the Department of Health and Human Services, which is probably unrivaled within the Federal Government in the extent and diversity of its legislation, a legislative proposal is commonly reduced to written specifications. This arrangement seems optimal. It compels the responsible policy officials to refine the content of a proposal, at least in a preliminary fashion, before they may look to the draftsman for preparation of a draft bill; yet the process usually offers the draftsman an opportunity to participate in the proposal's formulation.

The last of your tasks, as a legislative draftsman asssigned by a federal agency to prepare a major draft bill for submission to Congress, is actually writing the bill. If you have done the necessary preliminary work, it is the task that is the least time-consuming. Here are the steps you should take, in chronological order, before you begin to write:

(1) *General policy review.* You should review drafts of the "decision memorandum" that explains the proposal in general terms to the agency head and asks his approval for its further development.

(2) *Issue refinement.* After the agency head endorses the initial general proposal, you should help to refine, develop, and present issues for his subsequent decision.

(3) *Preparation of legislative specifications.* You should advise on how to prepare the "legislative specifications", *i.e.*, the written expression of the detailed policy decisions that you must incorporate in the bill.

(4) *Clarification of legislative specifications.* Upon receiving the specifications, you should clarify them

through telephone calls, meetings, or memoranda.

(5) *Preparation of drafting outline, if necessary.* If the proposal involves amendments to current law, you should prepare a drafting outline for your own use that specifies each section of current law that must be amended, and describes how it is to be amended. If the proposal is for a wholly new statute, you should outline the contents of each section of the draft bill.

If you have taken these steps, you are ready to write the first draft of the bill, circulate it within the agency for review, revise it to take account of comments, circulate a second draft, and so on until a draft is finally agreed to.

§1.2. *Guides for evaluating the adequacy of legislative specifications.* When you receive a set of legislative specifications approved by an agency policy official, you know that the awful moment has arrived when you are actually called upon to do something. This moment is especially terrifying when, as often happens, the time reserved for the draftsman has been eroded by delays in reaching decisions on the specifications. Often the policy debate would not end at all except that over the horizon there comes into view some event—a presidential message, a congressional committee hearing, a subcommittee bill mark-up—that irresistibly compels argument to yield to action. All eyes then turn upon *you* and you are told that unless you prepare your bill within X days (X days always being fewer days than the job demands) the government will fall to its knees.

At Appendix A you will find specifications for a bill to deal with "domestic violence". These specifications are reproduced without change from the files of the Legislation Division of the Department of Health and Human Services (formerly the Department of Health, Education, and Welfare). Please read them carefully.

Notice that the specifications at no point reveal what "domestic violence" is. The uninitiated could readily conclude that the specifications describe a proposal for services to those injured in urban street fighting or a program of law enforcement assistance to deter civil riots. This omission illustrates an important truth. Legislative specifications are usually vague and incomplete. In part this is attributable to the policy officials' reliance on the draftsman's knowledge and judgment; even more so, this reflects the embryonic stage of the policy officials' thoughts. The draftsman must now engage the policy officials in a colloquy to inform himself exactly as to what he must do. Often this colloquy will reveal to the policy officials that they are not sure, beyond general objectives, what they themselves want to accomplish.

For example, although you might infer that the specifications look toward a bill intended to reduce wife-beating you do not know whether the bill is to make federal funds available for projects dealing with child abuse or parent abuse. In all probability you will find that on these major issues the policy officials have a definite view, which they merely neglected to express in the specifications. If you were to ask, however, whether they wish a federally supported domestic violence project to assist an adult male who has been injured by his adult brother with whom he shares an apartment, the answer may be less certain.

In extreme cases, specifications are so incomplete as to be unacceptable. Most of the time, though, they are sufficient to enable an experienced draftsman, after clarifying a handful of issues, to write a first draft that contains at least something on every item with which they deal. Necessarily, this means that the draftsman will have to anticipate ultimate policy decisions on innumerable small matters.

On the question of when to draft, I follow these guides:

(1) *Essential concepts.* If the specifications are obscure on an aspect of the proposal that would be time-consuming or otherwise hard to draft—something that might take an experienced draftsman more than an hour, let us say—I prefer to obtain guidance on what precisely is intended.

(2) *Boilerplate.* If the specifications are obscure on "boilerplate", that is, those portions of agency programs that tend to show up in similar form from statute to statute, I do not seek guidance. Instead, I draft what I think will be an appropriate set of provisions.

(3) *Other.* If the specifications are obscure on matters that do not fall readily under one of the two preceding rules, what I do depends upon the time I have available to prepare the draft and my feeling for the material.

Some draftsmen prefer to draft immediately upon receiving specifications, simply guessing at obscurities. They argue that the test of whether a draftsman understands an idea is whether he can write a provision expressing it. During the writing itself he will discover gaps and ambiguities even in specifications that at first seemed complete and clear. If the technique of early drafting wastes some time and energy, these may be more than repaid, they contend, by the insights that early drafting will give the draftsman into the demands of the job: insights that he will need in order to make his initial meeting with the policy officials on the proposal as productive as possible.

Of course, if you receive specifications about whose subject matter you have no prior knowledge, nothing will be clear enough to draft. To guard

against this, the first two steps that §1.1 lists as preceding the actual bill writing are general policy review and issue refinement. Both involve use of the draftsman before the specifications are written. Contrary to the views of those (usually lawyers) who believe that the legal discipline especially fits one to formulate social policy, the early involvement of the draftsman in general policy review and specification refinement is less in tribute to his potential contribution to those enterprises than to a need to give him early exposure to policy thinking. As the draftsman, you need this exposure to understand the issues and how your clients approach them. It will enable you to guide yourself by both your awareness of what the policy officials are seeking and your recollection of the choices that they have rejected. Together with your program knowledge of what is administratively feasible, this early involvement will enable you to perform creditably at high speed when the specifications arrive.

§1.3 *Applying the guides.* Using the domestic violence specifications as an example, you probably should not attempt to draft a bill until you obtain a decision on whether all authority, consistent with what was the usual HEW practice, is to be vested in the Secretary rather than in subordinate officials or entities. Before beginning to draft, you will also want guidance on the citizen participation requirements, because the specifications may contemplate an elaborate system of public hearings leading toward the preparation of an annual state services plan and participation of volunteers and nonprofit private groups to implement it. (See, for example, section 2004 of the Social Security Act.) On the other hand, you should not wait for answers to questions on the need for sanctions should a state fail to comply with its plan assurances. You should simply write in a provision such as this:

> If the Secretary, after reasonable notice and an opportunity for a hearing to the State, finds that the State has failed to comply with any requirement under this Act, he shall notify the State that further payments will not be made to the State under this Act until he is satisfied that there will no longer be any such failure to comply, and until he is so satisfied he shall make no further payments to the State.

Your explanatory memorandum circulating the first draft for review should alert the addressees to your treatment of the sanctions issue. They will tell you if they have different ideas.

You may well ask why you should waste any time at all in drafting on the basis of your best guess as to the intentions of the specifications. Admittedly, it might be more efficient to remove all uncertainties before drafting, but this is generally not practical. Specifications are typically fluid and different policy officials often have different ideas on details. A draft bill is a marvelous instrument for concentrating the mind of the policy maker; it usually precipitates many specifications changes that might not be thought of otherwise. The draftsman observes that today's decisions, hastily made, are tomorrow's decisions hastily reversed. Time spent on perfecting a first draft is thus usually time wasted. Moreover, even when major policy changes are not in prospect, policy officials remain an impatient breed, especially when awaiting the work of others. They ordinarily prefer to review an imperfect draft bill rather than countenance the delays that are sure to attend the draftsman's effort to resolve all policy issues before drafting. As far as technical matters go, you can polish the draft while the policy makers are studying it. There is no need to delay their review because you want to perfect the bill. As in other areas of the law, the most precious commodity in drafting is time.

§1.4 *Determining where to clarify specifications.* When reading specifications, you must constantly ask yourself, "If this were a statute addressed to me, how exactly would I go about carrying it out?" Put yourself in the place of one who must administer the specifications once they become law. Think through in detail the specific actions that you would have to take. You need not translate all of these specific actions into bill language; it is not your objective to write as detailed a bill as you are able to imagine. Your purpose is simply to assure yourself that the specifications will result in a statute that is unambiguous and capable of being followed.

If you look at specifications this way, you will be able to write a bill that facilitates the actions of those who must implement it. To take a trivial example of the neglect of this principle, the morning Washington commuter who drives west along Independence Avenue daily encounters illuminated signs apparently instructing him to "Use All Lanes."

§1.5 *Examples of unclear specifications.* Let us apply this way of looking at specifications to the domestic violence specifications at Appendix A. To begin with, notice that they announce that state grants are to be "distributed by formula based on population with a floor of $100,000 per State." Assume that this phrase becomes law and that Congress appropriates $20 million for 1980. Some administrator must now figure out who gets what. The first step is easy: the specifications (which we now deem to be the law) allot 65 percent of the appropriation for the state grant program. Sixty-five percent of $20 million is $13 million.

At this point, the problems begin:

(1) *What is a State?* The administrator does not know whether the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, or the Commonwealth of the Northern Mariana Islands. All of the Department's other programs are in effect in D.C., and most of them are in effect in one or more territories.

(2) *Which population figures?* The administrator does not know which of several widely used measures of population he should use or how much discretion he has to select among data. For example, the Bureau of the Census, in *Current Population Reports*, estimates that the population of Alaska increased almost 4 percent between 1970 and 1976. But the 1970 census figure, based on a total survey, is more reliable than the samplings that show the increase. Should the administrator select the most recent year for which reliable data is available for all of the states, should he use the 1970 census, or should he use what he considers to be the most recent reliable data for *each* state even though this may mean using different years for different states?

(3) *How to make payments?* The administrator does not know how to pay the allotment to the states. Is it to be solely by reimbursement or may he pay in advance on the basis of estimates? In case you think this is an easy question, I invite your attention to 31 U.S.C. 529, "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law."

(4) *What formula?* Worst of all, the administrator does not know how to do the necessary arithmetic.

Even if the administrator solves the first three problems in a fashion that produces certainty and avoids litigation, he will discover that there are at least two plausible ways of performing the calculation for making state allotments, each of which produces different results. One way is to allot the entire $13 million among the states on the basis of population, and thereafter increase to $100,000 the allotment of each state that would otherwise fall below $100,000. In this case, he must select among alternative means of reducing the states that are initially above $100,000, in order to obtain the money to increase the other states. If the means he selects are simply to reduce all of those above-$100,000 states *pro rata*, he will find that, in bringing up the below-$100,000 states, he has reduced one or more states below $100,000 that were previously at or above $100,000. He will then have to perform the computation a third time, and so on, until all states are at or above $100,000. Another possible way of making the allocation is to allot $100,000 to each state, so as to meet the requirement of a "floor", and thereafter to allot the balance among them on the basis of their respective populations.

Appendix B is a computer run that allots the $13 million in the two ways described. For several states the difference in allotments is large. The *pro rata* reduction method allots $1,036,300 to New York, compared to the initial-floor allocation method, which allots only $762,600: a loss to New York of $273,700. The initial-floor allocation method would cost California $309,300, but would increase the allotments for Puerto Rico by nearly 30 percent and Utah by almost 40 percent. If an ambiguous allotment formula were enacted, litigation would be a certainty because the amounts at issue would be enough to pay the states' litigation costs. Needless to say, your job as the draftsman is to identify the allotment method intended and draft it clearly.

Consider another example. The specifications at Appendix A tell us, "State requirements include . . . the establishment of linkages between this program and law enforcement agencies and other agencies providing services to domestic violence victims . . .". As an administrator, what must you do to establish "linkages"? Do you make an occasional telephone call to other agencies or do you establish a highly structured arrangement among agencies for coordinated action? This specification reflects the policy officials' belief that a program to assist the victims of domestic violence would be more effective if it took account of other resources that the state can bring to bear. Unfortunately, it also reflects their unwillingness to subject their belief to serious analysis. If the bill is to demand linkages, it should either say what they are or provide a means for the Secretary and the state to agree on what they are. You will want to ask the policy officials for further guidance.

You have already observed the fog around the term "domestic violence". The term is a convenient way of expressing a complex and partly unformulated idea. This sort of compression causes a common problem in legislative specifications, which typically abound in verbal shorthand. Some of this jargon is indispensable. In the arcana of social security benefit law, for example, phrases used in specifications such as "dropout years", "guarantee cases", "old-starts", or the like, are convenient terms-of-art precisely alluding to complicated statutory provisions. You must know what the phrases mean if you are to draft social security amendments. On the other hand, the use of a term or catch-word, such as "domestic violence" or "linkages", may merely serve as a cloak for imprecision.

§1.6. *Exercise in formulating clarifying questions.* With experience, you will become sensitive to the parts of legislative specifications, such as those discussed, that are nebulous. As an exercise, write out

the questions that you will want answered in order to enable you to draft a bill from the specifications at Appendix A. When you have done this, compare your list with the one at Appendix C. In making this comparison, keep two things in mind. First, for teaching purposes, Appendix C includes many questions that most experienced draftsmen would initially answer for themselves. Second, Appendix C excludes many questions that will later occur to the draftsman as he actually writes the bill.

CHAPTER TWO

Structuring a Free-Standing Bill

§2.1. *Objectives.* The domestic violence specifications are for a free-standing bill. This chapter concerns itself with the principles that should govern the structure of such bills. A draft bill may, alternatively, seek only to amend existing statutes, or may contain both free-standing and amendatory provisions. Amendatory bills are discussed in chapter four.

To continue the focus on free-standing bills, assume that you have met with the policy officials responsible for the domestic violence specifications and that they have answered the Appendix C questions in the manner recorded at Appendix D. You are now ready to draft.

As your first step, you should divide your bill into bite-size chunks and, as a second step, arrange those chunks in some digestible way. Your aim is a framework that others can readily understand, remember, and retrace, and that future draftsmen can conveniently amend. Attaining these objectives for a draft bill calls for the exercise of intuition schooled by experience. Nevertheless, the ideas that follow—some obvious, some elusive—may serve you as guides.

§2.2 *Keeping your bill sections conceptually distinct.* Statutes are divided into numbered sections. You can draw a useful suggestion on how best to make this division from a remark of the Canadian economist and author, Stephen Leacock, about his proficiency in languages. He observed that after only brief study of Latin and Greek he found that merely by glancing at a page of each he could tell which was which.

This brings us to the first rule of sectional division. It should be possible to tell which sections deal with which subjects. This may not strike you as an especially profound insight. Stated more pretentiously, it is the principle that each of your sections should be devoted to a topic that is conceptually distinct from the topic of any other section. This enables the reader to infer a section's content from its heading with assurance that the material for which he is searching is not also covered in other sections. To accomplish this you must first follow a coherent theory of division in allocating material among sections. Then, either you must draft your sections to be of the same order of generality or, if the ideas of some sections are logically subordinate to those of other sections, you must reveal the logical hierarchy of those ideas in the sequence of the sections and in their captions. The ordering of sections is discussed at §2.6.

The Egg Products Inspection Act, outlined at Appendix E, shows a way to achieve conceptual distinctiveness. The Act's draftsman had to write requirements for the continuous inspection and sanitary operation of egg processing plants, and the condemnation of adulterated egg products. He grouped requirements for continuous inspection and condemnation in section 5 and placed the requirements for sanitary operation in section 6. The conceptual distinction between these sections is based on their theoretically different addressees. Section 5 instructs the Secretary when to inspect and condemn; section 6 instructs the plant operator to comply with sanitary regulations. In reality, the plant operator and the Secretary are interested in both provisions. But separating the sections in accordance with some logical principle, in this case the putatively different audience to which each is directed, allows the draftsman to ease the burden of locating and understanding the sections and to avoid overlap.

Conceptually distinct ideas do not necessarily call for separate sections. For example, the lawyer's analytical grid has separate compartments for (1) an instruction to inspect and (2) an instruction to seize for condemnation that which is inspected. Why did the draftsman combine these instructions in a single section, when it would have been so easy to illustrate their conceptual distinction by writing them as separate sections? Without being privy to the draftsman's thinking, you might nevertheless guess that his reasoning went something like this: The purpose of inspection is to assure quality by locating adulterated products; the consequence of locating an adulterated product is its seizure for condemnation. How better to underscore the interrelationship of these ideas than by including both of them in the same section?

Knowing when to separate ideas and when to combine them involves the balancing of intangibles in ways that no rules are likely to instruct. In the last case, for example, if joining the two concepts produced an interminable section, the draftsman might

have elected to separate them. Do not use different sections for different concepts, though, if the concepts are integral to each other, so that one of them, by standing alone in a section, implies the nonexistence of the other. In that case, the two concepts should either be in a single section or cross referenced.

A common violation of this last rule, the so-called "split amendment", is discussed in chapter four. The split amendment consists of two sections, one making an apparently unconditional amendment to a statute, and the other, as the reader discovers later in the amendatory legislation, causing the first section to be effective only for cases that are subject to some previously undisclosed contingency.

§2.3. *Examples of sections that illustrate and sections that blur the relative subordination of their ideas.* The ideal statutory structure is one in which each section deals comprehensively with a single topic, identified in its caption. It allows the reader to find within each section every rule that is logically subordinate to that topic. This means, of course, that every section is of the same generality—another way of saying that the subject matter of one section is not dealt with by another section.

Such an ideal statute should also contain only short sections because, other things equal, short sections are easier to read and understand than long sections. Unfortunately, the two principles—combine like ideas for logical coherence, but separate ideas for ready intelligibility—push the draftsman in opposite directions, sometimes with bizarre results. Title II of the Social Security Act has separate sections for its definitions of wages, employment, and self-employment. But there is also a section labeled "Other Definitions", which includes definitions of a wife, widow, divorced wife and divorce, child, husband, and widower (yes, in that order), plus a number of rules that do not look much like definitions at all (such as a subsection entitled, "When Periods of Limitation End on Nonwork Days", and one labeled, "Waiver of 9-Month Requirement for Widow, Stepchild, or Widower in Certain Death Cases, or in the Case of Remarriage to the Same Individual"). The principle of division is probably the relative length of the sections involved. Is that principle likely to help the reader locate a definition in title II?

In contrast, the Egg Act groups all of its definitions in a single section, section 4. If the definitions had been long and complex, as in title II of the Social Security Act, the draftsman might have assigned a separate section to each definition. An analog of this is the Internal Revenue Code's allowable deductions from gross income. The 1939 Code collected these deductions in a single section, section 23. The user of the Code knew that there was only one section to which he needed to resort to study the rules that applied to a particular deduction. That section would, however, also include other deductions. In recognition of the growing complexity of tax law, the 1954 Code affords each deduction its own section. The user still need only resort to one section for a particular deduction, although now that section is more narrowly focused.

The clustering of definitions or deductions into a single section makes the section conceptually distinct from other sections. In the case of the Egg Act and the 1939 Code, definitions sections and deductions sections are not logically subordinate to the ideas that dominate the other statutory sections. Similarly none of the deduction sections in the 1954 Code, which devotes to each deduction an individual section, is logically subordinate to any other deduction section, because the basis for division is the difference in subject matter.

§2.4. *An example of economy in drafting.* A further goal in shaping sections is that of drafting economically. The Egg Act pursues it by using a single section to define many of its terms. Without any loss of clarity, these terms could have been defined each time they were used. By defining them only once for the entire Act the draftsman not only preserves our forests (an ecological objective rarely sought by legislative draftsmen), but avoids cluttering other sections of the bill with repetitious material. Later, we will consider this goal further.

§2.5 *Exercise in subdividing specifications into sections.* Before considering how the sections of a free-standing bill should be ordered, perform the following exercise. List every distinct idea or purpose in the domestic violence specifications at Appendix A (as clarified by Appendices C and D) that seems indivisible and worthy of expression by a separate section. Then place each specification under the section heading whose main idea seems to include it. No specification should be addressed by more than one section, and the sections, taken together, should cover all of the specifications. If the subject matter of a specification seems naturally to fall into two sections, you should either rethink your sections or divide the specification into two conceptually distinct parts.

Compare your effort with Appendix F. Keep in mind that when, as a later exercise, you arrange your sections in logical order, you will be free to aggregate bodies of related sections into separate

titles of the bill if this seems necessary to assist the reader in understanding the subordination of groups of provisions to more abstract concepts. At the planning stage of a bill, sectional divisions are tentative. As you draft the bill, itself, you may think of ways to improve on your original sectioning.

§2.6 *Putting sections in the proper sequence.* The sequence of the main provisions of the Egg Act, summarized at Appendix E, may be outlined as follows:

(1) Short title.
(2) Findings and purpose.
(3) Definitions.
(4) Principal operative provision, which also specifies the Act's scope.
(5) Subordinate operative provisions.
(6) Prohibited acts (and related exclusions from prohibited acts).
(7) Sanctions for commission of prohibited acts or other offenses.
(8) General administrative authorities and procedural rules.
(9) Jurisdiction of the courts.
(10) Relationship of the Act to other statutes.
(11) Administering agency's report to Congress.
(12) Appropriations authorization.
(13) Separability section.
(14) Effective dates.

This sequence is common in statutes that establish new programs. It enables one to understand a statute by reading its sections consecutively, as you would read the chapters of a book. Do not conclude from this that rules of composition that promote the clarity of draft bills are always those of an essayist. The draftsman is not employed to produce a work of literature, but to express legislative policy clearly and simply. Admittedly, definitions stacked at the beginning of a bill can be tedious and will delay the reader in coming to the "meat", the bill's operative provisions. On the other hand, this placement serves several important functions. It warns the reader early that certain terms have meanings that may differ from their dictionary definitions. Also, by immediately acquainting the reader in detail with the bill's subject matter, it makes the bill's operative provisions, read subsequently, more comprehensible.

As in the Egg Act, a bill's key operative provisions should come ahead of provisions having less scope. In short, the main material is up front. Administrative and technical provisions, or provisions of temporary effect (such as savings or grandfather provisions, repealers, and so on) come at the end. For example, the appropriations authorization (if any) for a regulatory statute, *i.e.*, in most cases a statute based on the commerce clause or the taxing power, is of limited interest and can be tucked away somewhere. In the case of a grant-in-aid statute, *i.e.*, a statute based on the welfare clause, such as one that allocates appropriations among applicants, the appropriations authorization is of wide concern; for this reason, it is usually best placed near the beginning of the statute, preferably immediately ahead of the section that allocates the appropriations.

The Egg Act adopts an order that reveals the logical connections among that Act's sections and fits the reasonable expectations of the user. It is not an arrangement written in the heavens for all bills. If another sequence better serves the purposes for a specific subject, you should follow it.

§2.7. *Exercise in sequencing sections.* Using the principles described, place the sections of the domestic violence bill into an acceptable order. Then compare your work with Appendix G.

§2.8 *Subdividing a section.* A bill's sections are subdivided into subsections for the same reasons and with the same logic that the bill's subject matter was divided into sections. If a section's central theme is most readily understood when analyzed into its component subsidiary themes, you should divide the section into subsections. Each subsection should develop a single idea, readily distinguishable from, and ordinarily not logically subordinate to, each of the ideas upon which the section's other subsections are founded. One or more of those subsections may be further subdivided in the same fashion.

The draft bill at Appendix H illustrates some of the principles of subdivision. The bill is intended to govern the authority of the Secretaries of Agriculture and HEW to regulate the use of nitrites in food from its effective date. The specifications called for a bill that prohibited the Secretaries from banning nitrites before May 1, 1980, but allowed them to order nitrites off the market on or after that date, subject to certain procedural requirements. This temporal discontinuity divides section 3 from section 4. The principle of division was time, the principle of sequence was chronological order.

Section 4 would authorize action on nitrites after April 30, 1980, but had to be written to make the form of action depend upon which of two contingencies occurred. First, there was the possibility that nitrites might be shown to be safe. In that case, neither Secretary was to be permitted to ban them. Second, there was the possibility that nitrites might not be shown safe, but might be shown necessary to prevent botulism. In this second case, the Secretaries were to be allowed to ban nitrites after the lapse of a specified period. Separate subsections,

subsections (a) and (b) of section 4, divide these alternative findings, *i.e.*, (a) safe or (b) not safe, but necessary. (If, under section 4 procedures, there was a failure to show that nitrites were either safe or necessary, the section would cease to apply to them and they could be banned under other provisions of law.)

The specifications for subsection (b) (under which nitrites are not shown safe, but are shown to be necessary) called for allowing the appropriate Secretary to establish a period during which nitrites could continue to be marketed. This period was to be established after consideration of a variety of factors, and was supposed to represent the Secretary's best estimate of when a feasible substitute for nitrites that gave equivalent protection would be available. After that time, whether or not the substitute actually became available, the Secretary could limit or ban the use of nitrites in food.

The draftsman divided these ideas for subsection (b) into three paragraphs. Paragraph (1) requires the appropriate Secretary to establish the requisite period, paragraph (2) authorizes him to ban or otherwise condition the use of nitrites after the expiration of that period, and paragraph (3) lists the factors that he must consider in setting the period. The theory of the division between paragraphs (1) and (2) is easily explained on the same basis as the division between sections 3 and 4, *i.e.*, time. Paragraph (3), however, is not so comfortably accounted for. Although the material in that paragraph is conceptually distinct from that of the other two paragraphs, can it be argued that it is logically subordinate to the requirement of paragraph (1) that a period be set? Is it of the same order of generality, in the context, as the second sentence of paragraph (1), which specifies the considerations in evaluating the "means not requiring the addition of nitrite"? If so, would not both the second sentence of paragraph (1) and all of paragraph (3) merely be different lists of things to be weighed in setting the length of the period? Should they be combined in that case?

§2.9. *Exercise in reorganizing and redrafting a subsection.* As an exercise, redraft section 4(b) of the nitrite bill at Appendix H to reflect your understanding of the logical subordination of its ideas. Has your redraft made the subsection clearer?

What you may find is that section 4(b) is improved by switching paragraphs (2) and (3), and qualifying the phrase "period of time" in paragraph (1) with a phrase such as ", determined under paragraph (2), that". This bares the hierarchy of ideas by improving the order of the presentation. Note, though, that any attempt to merge paragraphs (1) and (3), or create a new paragraph (2) from the feasibility and effectiveness requirement of paragraph (1) and the period criteria of paragraph (3), will plunge you into five levels of subdivision, *e.g.*, section 4(b)(1)(A)(i). Subdividing to this level makes a provision long and diffcult to follow.

The answer to a question that preceded this exercise, whether both the second sentence of paragraph (1) and all of paragraph (3) are merely different lists of things to be weighed in setting the length of the period, is probably negative. The desideratum of the period to be set is the time it takes to develop a feasible and effective nitrite substitute. This seems an issue of technology. But in resolving the issue the Secretary must consider factors specified by paragraph (3) that seem less relevant to technology than to risk. Therefore, paragraphs (1) and (3) are dealing with lists that are *qualitatively* different, and are appropriately covered in separate paragraphs.

§2.10. *Technical features of bill structure and internal cross referencing.* You may use the nitrite bill at Appendix H as a model for the elements of a draft bill. Every draft bill has a long title and an enacting clause. Some bills, such as the nitrite bill, have short titles as well. If, like the nitrite bill, a bill has a short title immediately following the enacting clause, the short title is preceded by the word "That" and counts as the bill's first section. References to the location of that short title are to "the first section", not to "section one". The next section will appear as "Sec. 2."

If the bill begins with a numbered section 1, the section designator is written, "Section 1", not "Sec. 1". Subsequent sections appears as, "Sec. [number]".

If a bill has titles, all sections under title I should be in the 100 series, those under title II should be in the 200 series, and so forth. If a title is divided into subtitles or other parts (designated "I", "II", or "A", "B", and so forth), each part should begin at the beginning of a 10 series, *e.g.*, part A begins at 100, part B at 120, part C at 140. This leaves room to add sections to a part, after the bill becomes law, without complicated renumbering of the entire title. It also makes it convenient to add new sections to successive drafts of the bill.

The major subdivisions of a section are subsections. They appear as small letters in parentheses ("(a)", "(b)", etc.). Because subsections set forth a complete thought—a full sentence at a minimum —paragraph designators replace subsection designators if the principal subdivisions of a section are merely parts of a tabulated sentence—*i.e.*, a sentence whose parts are set out as indented phrases—

even though the subdivision is the first division after the section number. Typically, this occurs in definition sections, such as section 2 of the nitrite bill.

Subsections are divided into numbered paragraphs ("(1)", "(2)", etc.) which are tabulated, but need not be paragraphs or even sentences.

Paragraphs are divided into lettered subparagraphs ("(A)", "(B)", etc.) that follow the same formal rules as do paragraphs.

Subparagraphs are divided into clauses bearing small roman numerals ("(i)", "(ii)", "(iii)", "(iv)"), that are, in turn, divided into clauses bearing large roman numerals ("(I)", "(II)", etc.). These follow the same rules as paragraphs and subparagraphs.

Where a subdivision does not appear in tabular form, as in the subdivisions of sections 4(a) and 4(b)(1) of the nitrite bill, the enumerated matter is referred to merely as a "clause", regardless of its alphameric designation.

Examples of cross references within a bill are: "section 204(a)(3)(B)", "subsection (a)(3)(B)", "paragraph (3)(B)", "subparagraph (B)", "subparagraph (B) of paragraph (3)", "paragraph (3)(B) of subsection (a)". All of these references are to a subparagraph (B). It is improper to refer to "section 204 of title II" if the reference appears within the Act containing title II. The correct reference, in that case, is "section 204 of this Act" or merely "section 204".

A cross reference to a subdivision of the section in which the cross reference appears should not name the section. In other words, if in section 204(a) you wish to refer to section 204(b), your cross reference should read "subsection (b)" or "subsection (b) of this section", not "section 204(b)". Analogous rules are followed for references within a paragraph of a subsection to another paragraph of the subsection. The reference should be "paragraph (2)" or "paragraph (2) of this subsection", not "section 204(b)(2)". Similarly, a reference in section 204(a) to a paragraph in section 204(b) should read "subsection (b)(2)", "subsection (b)(2) of this section", "paragraph (2) of subsection (b)", or "paragraph (2) of subsection (b) of this section". A corresponding practice should be followed in referring to other subdivisions within the section containing the reference.

A reference within a subdivision to the subdivision itself should appear simply as "this [name the order of subdivision]". The name of a subdivision does not necessarily correspond with the rhetorical unit that bears that name in formal composition. A "paragraph" in legislation may be no more than a clause (as are the paragraphs of section 2 of the nitrite bill). Nevertheless, it is more common to cross refer to "paragraph (1)", say, rather than "clause (1)", because this facilitates distinguishing among subdivisions. The exception to this rule is the cross reference to an internal (that is, unindented) designation, such as appears in sections 4(a) and 4(b)(1) of the nitrite bill. Here, you would speak of "clause (1)" or "clause (A)".

CHAPTER THREE

Writing Each Section of a Free-Standing Bill

§3.1. *Where to start.* If you have carefully planned your bill and expect it to be short, like the domestic violence proposal at Appendix A, you may draft its sections in any order you please without its making a difference to anyone or to the quality of the final product.

The order of drafting is important if, as is often the case with long and complicated bills, you must circulate each portion of the bill to policy officials for review as it is drafted. Unfortunately, these circumstances present a dilemma. On the one hand, if some of the bill's main provisions are difficult to draft, you will want to draft them earlier than less consequential provisions so that policy officials have more time to consider them. This also gives you more time to refine the provisions before the bill is sent outside of the agency. This alternative leaves the drafting of boilerplate for last, since it should need little review and redrafting.

On the other hand, when one confronts a hungry lion, one throws to it whatever meat is handy. Routine administrative provisions are often voluminous but nevertheless easy to write quickly; you may be tempted to dash them off first, circulate them for review, and while that review is in progress turn to the more demanding sections. This tends to shortchange the bill's most sensitive provisions, which do not, ultimately, get as much attention as the less significant boilerplate provisions. Yet, this alternative has the appearance of efficiency because it speeds the initiation of review. Moreover, it will enable you to draft the bill's most difficult sections at your (comparative) leisure.

§3.2 *Short titles.* If, for convenience of reference, you assign a short title to an act or to a title of an act, Avoid two pitfalls:

(1) Do not use the year of expected enactment in the short title of a free-standing bill. Trying to remember, and having to restate, that year will be a nuisance to everyone who has to cite the law. The "Higher Education Act of 1965", for example, should have been called the "Higher Education Act". The year of a law is appropriate, though, to distinguish among a series of amendatory laws, *e.g.*, the "Social Security Amendments of 1977", in order to avoid confusion with the Social Security Amendments of 1972.

(2) Do not lose sight of the objective of short titles, which is to make it easy to refer to the bill. Does the short title, "The Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963" (enacted as P.L. 88-164, 77 Stat. 282) accomplish this objective?

§3.3. *Findings and statement of purpose.* Findings and statements of purpose may be useful, in a bill founded on the commerce clause, to bolster the constitutional validity of provisions to regulate intrastate commerce. Beyond this—in bills based on the welfare clause, for example—they serve no significant legal purpose. If policy or congressional relations officials insist upon them, you may allow their staffs to write them, subject to your editorial review.

§3.4. *Definitions.* Happily, all of the words you will need to draft a bill are defined in the dictionary. Defining terms in a bill should be limited to cases in which dictionary definitions are too vague, too inclusive, or too narrow for purposes of the bill, or are ambiguous in the context; or if you wish to stipulate a meaning for a term that is different from its dictionary definition, or assign to it some meaning not conveyed by common understanding of the words comprising it.

1. *Pre-existing statutory definitions and rules of construction.* There are several statutes that define certain terms for any law of the United States in which the terms appear. The most significant of these is 1 U.S.C. 1, entitled "Rules of Construction". The following are among its more important provisions:

(1) words importing the singular include and apply to several persons, parties, or things;

(2) words importing the plural include the singular;

(3) words importing the masculine gender include the feminine as well;

(4) words used in the present tense include the future as well as the present;

(5) the words "person and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

Section 237 of the Revised Statutes (31 U.S.C. 1020) now establishes the fiscal year of the federal government. This is discussed in §3.6, below.

The Federal Grant and Cooperative Agreement Act of 1977, P.L. 95-224, is a nobly motivated but imperfectly executed effort to establish government-wide criteria for the selection of legal instruments for various governmental purposes. Its provisions affect the meaning of the terms "grant" and "contract", and create a new legal relationship styled "cooperative agreement". This is discussed in item 3 of this section.

2. *Partial definitions.* Generally, it is better to assume the dictionary definition of a word, if feasible, and clarify the term's penumbra. For example, if you want to include osteopathic practitioners as participants in a state grant program on the same basis as physicians, you do not have to write a comprehensive definition of "physician". You need merely provide, "The term 'physician' includes an osteopathic practitioner as determined under the law of the State in which he is practicing." A variation of this technique, in the form of a comprehensive definition, is, "The term 'physician' means an individual who is licensed as a physician or osteopathic practitioner under the law of the State in which he is practicing." Unlike formal writing, legislative drafting allows you to define a word in terms of itself.

3. *Pickwickian definitions.* Avoid assigning to a term a meaning that strays very far from common usage. There are several reasons for this. The drag of a word's normal meaning is very strong; if you give to a word of highly idiosyncratic meaning, you run the risk—at least in a long bill—of forgetting this meaning and employing the word in its customary sense, with resulting confusion. Morever, it is difficult for a reader to keep odd definitions in mind; their use reduces a bill's intelligibility. For example, many years ago, in a bill introduced in Congress to revise the conflict-of-interest criminal provisions of title 18 of the United States Code, the term "bribery" was defined to include *all* amounts received by a federal employee as compensation for *any* service. The bill then proceeded to exempt from its penalty provisions those amounts received as salary from federal employment. Apart from the difficulty of keeping this weird definition in mind, one can imagine the feelings of federal employees, if the bill had been enacted, upon learning that a criminal statute designated their paychecks as bribes.

Appendix I contains a more recent example of definitional roulette in a bill that the President twice vetoed. You will notice that it "deems" the term "poultry" to refer to "domesticated rabbits", the term "domesticated bird" to refer to "domesticated rabbit", and a reference to "feathers" to be a reference to "pelt". We will return to this bill at §4.7.2.

Drafting economy will dictate minor departures from the principle of defining words within the ambit of their common usage. For example, a widely accepted drafting convention is to define the term "State" to include the District of Columbia and some or all of the territories. This avoids the need to repeat constantly throughout the bill the litany, "State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands". The convenience of this practice overcomes the reservations of the purist.

In 1979, HEW proposed a Mental Health Systems bill that contains an example of how to obtain the type of advantage illustrated by the definition of "State", without at the same time distorting the word that is defined. The Federal Grant and Cooperative Agreement Act prescribes, among other things, the use of a "cooperative agreement" to establish a legal relationship that the Act defines very similarly to to the way it defines the relationship of grantor to grantee (for which it prescribes the use of a grant agreement). The draftsman of the Mental Health Systems bill wanted to avoid the necessity of repeating "or enter into a cooperative agreement" every time he authorized the Secretary to award "a grant". At the same time, he was reluctant to define "grant" to include a cooperative agreement, because the FGCA Act apparently contemplates that the cooperative agreement will give rise to a different relationship between the parties than does a grant agreement.

His solution was to include a substantive provision in the bill that would authorize the Secretary to enter into a cooperative agreement in any case in which the bill would authorize a grant, provided that the conditions imposed under the cooperative agreement were the same as those that the Secretary would impose as a condition for receipt of a grant. Also, the entity entering into the agreement with the Secretary would be subject to all conditions of the bill to which a grantee would be subject. This treatment reveals that what appeared to be a definition problem was a more subtle problem better handled by a substantive provision.

4. *Definitions that impose substantive requirements.* Chapter two explains why it is a bad idea to put operative provisions—the bill's substantive rules—into a section labeled "Definitions". Doing so may

mislead one who reads only the bill's substantive sections, which have thereby been rendered deceptively simple. The reader may believe that he has grasped the bill's essential rules, when unknown to him a body of them is elsewhere.

Putting substantive rules in definitions is a "quick and dirty" technique of whipping up a fast amendment to a complicated statute. It is a rare professional legislative draftsman who has not sinned this way, less from ignorance than from the need for haste. Usually, when this is done, the substantive rules are given the formal appearance of definitions. The Federal Food, Drug, and Cosmetic Act has some choice examples. The Act regulates, among other things, all new animal drugs. Nevertheless, the Secretary is authorized to exempt from regulation a drug that he finds is generally recognized as safe and effective, and with respect to which batch certification is unnecessary to assure its identity, strength, quality, and purity. This authority is found in the Act's definition of the term "new animal drug", where it appears in the form of an exclusion from that term of any drug that has been the subject of that finding.

Another example is the Act's informal hearing requirements. The Act's intention appears to be that of substituting its own hearing requirements for requirements that might otherwise be imposed by the Administrative Procedure Act as the prelude to issuing certain orders. The proper way to accomplish this is to write a section or sectional subdivision labeled "Informal Hearings" and, in each place in the Act that is to provide for an informal hearing, to add language such as, ". . . the petitioner shall have an opportunity for an informal hearing on the order under [cite the Informal Hearings section or sectional subdivision designation]." Instead, at each such place the draftsman merely provided, ". . . the petitioner shall have an opportunity for an informal hearing on the order." Then, in the Act's definitional section, he added a definition of "informal hearing" as one that "provides for the following: . . .". Six numbered paragraphs follow. Typical of them is paragraph (6):

> The Secretary may require the hearing to be transcribed. A party to the hearing shall have the right to have the hearing transcribed at his expense. Any transcription of a hearing shall be included in the presiding officer's report of the hearing.

A further example is in title XIII of the Public Health Service Act, which defines "health maintenance organization" in a section that is spread over four pages of the Statutes at Large. Under that section, an HMO may reinsure its financial risk for the cost of providing health care to any member in excess of $5,000. But if it reinsures its financial risk for any such cost in excess of $4,999.99, the organization ceases to be an HMO under the statute. To be fair to the draftsman, he did put all of this under a caption that reads, "Requirements for Health Maintenance Organizations", not "Definitions". Nevertheless, it would have been better practice to define an HMO in a manner reflecting the common understanding of what an HMO is, and then make eligible for assistance under the Act an HMO that complies with specified substantive requirements.

5. *Definitions in odd locations.* If a definition is to be used in only one section of a lengthy Act, you may put it in that section, rather than with the Act's general definitions. In that way, it will be conveniently located: that is, in the only place it is used.

Conversely, avoid putting in a non-definitional section a definition of a term used throughout the Act. Otherwise, the reader will constantly be searching for the definition. Worse yet, he may not know that the term he is reading is defined. A well-worn exception to this last rule is in drafting the Act that has no general definitions section, if you wish to save the reader the burden of repeatedly ploughing through an extensive organizational name or title, such as, "the Secretary of Health and Human Services". Accepted practice permits you, the first time you refer to the name, to do so (if it is the Secretary, for example) as follows: "the Secretary of Health and Human Services (hereinafter in this Act referred to as the 'Secretary')". This exception is justified by three considerations: The term "Secretary" (or "Commission" or "Administration", etc.) is on its face a term that must surely be defined somewhere, so that the use of such shorthand does not mislead the reader. Most readers will be aware, anyway, what official or agency of government is administering the statute. And, finally, the definition will be easy to find because it must necessarily be located in one of the earlier sections.

§3.5. *Exercise in drafting definitions.* Before reading further, draft a definition of the term "domestic violence" to conform to the specifications at Appendix A (as clarified by Appendices C and D).

In drafting this definition (which you should now have completed) you probably reexamined Appendix D, answer 68-69, which says:

> Try a definition of domestic violence as injury done by an individual to his spouse, or done by an individual to one with whom he is (or was) living as man and wife (whether or not the relationship is so recognized under state law).

If you have uncritically accepted this specification,

you may have written a definition that looks like this:

> The term "domestic violence" means the infliction of physical injury by an individual upon his spouse, or by an individual upon one with whom he is (or was) living as man and wife (whether or not the relationship is so recognized under state law).

To test whether this dedicated transliteration of the specification really works, you must apply it to some hard cases. First, take the case of the man and woman, both married but not to each other, who are living together. If the man injures the woman is she eligible for services?

You will find that the definition does not supply a clear answer. The phrase, "living as man and wife (whether or not the relationship is so recognized under state law)", may contemplate a domestic arrangement that, except for the statutes of particular states, would be a common law marriage. If so, it is too restrictive. From the general tenor of the specifications, you can guess that the program is supposed to serve victims of relationships that would not be common law marriages regardless of state law.

Also, what does "living as man and wife" mean, if the individuals do not hold themselves out as man and wife and could not legally marry? Does it mean living together and engaging in sexual relations? If so, would it include an incestuous relationship? If incestuous relationships are included why are homosexual relationships excluded (as they seem to be)? Is this a moral preference?

Does the definition cover a man who abuses his wife verbally, if a physician claims that this abuse has caused the wife to develop an ulcer?

And how does this definition handle services to children who, although not the subject of domestic violence, are taken by an abused wife when she flees home?

First, you have to find out how the authors of the specifications want these questions answered. Assume you returned to them with a dozen cases, which you will find at Appendix J, devised with the objective of refining the concept of domestic violence. Here is a summary of what the resolution of those cases teaches:

- The underlying theme of the specifications is to provide services—not merely shelter, but counseling and other non-cash assistance as appropriate—to assist women who are psychologically dependent upon men who abuse them.
- The strength of this dependency cannot be gauged, in all cases, by the legal character of a given relationship, the recency of injury, or the recency of cohabitation.
- A person should not be required to answer questions about her sex life as a condition of receiving services under the proposal.
- On the other hand, the bill is essentially concerned with wife-beating, not psychological abuse, even though psychological abuse may have physical consequences.
- Finally, the bill's services are not to be available for homosexual or incestuous relationships.

Now revise the definition of domestic violence. You will simplify your task if you provide services to children of victims of domestic violence, who are to be eligible for services in particular circumstances, by an explicit provision. Then it will not be necessary to include them in the definition as individuals who may be subject to domestic violence.

One possible definition is this:

> The term "domestic violence" means the threat or infliction of physical injury upon an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include a threat or infliction of injury by an individual upon another of the same sex, or by an individual to whom the threatened or injured individual bears a relationship described in paragraphs (1) through (8) of 26 U.S.C. 152(a); and except that the term does not include an injury that is not the result of physical abuse.

The reference to 26 U.S.C. 152(a) is a shorthand way of excluding violence between family members who are not husband and wife.*

In Fundamentals of Legal Drafting, Reed Dickerson recommends a technique known as "tabulation" to assist the draftsman to examine the structure of his draft. An example of the tabulated version of the domestic violence definition is at Appendix K.

In testing the Appendix J cases against the revised definition, you will notice that, at the margins, the definition is somewhat vague. Cases 5 and 6 are probably covered, but surely would not be if the

* To improve readability, I might prefer to divide the definition into two sentences: the first to state the rule ("The term 'domestic violence' means . . . she is, or has been, living."); the second to announce the rule's exceptions ("The term does not include a threat . . . 26 U S C. 152(a); or an injury that is not the result of physical abuse"). This would be at variance, regrettably, with common drafting practice. If a rule is subject to an exception, most draftsmen feel obliged to warn of the exception in the sentence that states the rule. If the exception is extensive, the rule may be introduced like this: "Except as provided in [cross reference] . . .". Otherwise, the exception is included in the rule itself, as in the definition in the text. If I had divided the definition into the two sentences suggested, the rule, contained in the first sentence, would appear unqualified to those who neglected to read on. Or, to explain it conceptually, the interpretation of the first sentence would depend upon its being "construed" in light of the second sentence. The definition in the text does not require such construction.

man (in case 5) or the woman (in case 6) had a separate fixed address.

Also, the definition may pick up some "commune" cases: that is, women who have been struck by men with whom they have no relationship that goes beyond the sharing of a common abode. This is probably a small price to pay if the alternative is to require a female applicant for services to attest to an illicit relationship as a condition of eligibility.

A draftsman cannot anticipate all conceivable cases. The harder he tries, the more likely it is that he will introduce into his bill impediments to sensible administrative judgments. Also, the need for anticipation depends upon the likelihood and extent of abuse. If the bill were one that distributed large sums of money to domestic violence victims, a more exacting definition might be required.

The more elaborate a legislative requirement, the more complex the administrative procedure needed to give it effect. Unfortunately, the more complicated the administrative procedure, the less likely that it will work as the draftsman envisioned it. Peter Drucker, in his *Adventures of a Bystander*, attributes to the financier Ernest Freedberg the remark, "Everything has to be moron-proof, for work is always in the end done by morons."

§3.6. *Provisions to authorize appropriations.* Provisions authorizing appropriations respond to the singularities of the rules of the Senate and the House of Representatives, the proceedings of which are not much studied in law school. For this reason they usually puzzle the neophyte to government. He finds it curious that Congress need pass a law in order to empower itself to pass a law. The key to this enigma is the rule against appropriating amounts other than to fund activities authorized by law prior to the appropriation. Rule XXI, cl. 2, of the House of Representative provides, in pertinent part:

> No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress.

A further source of confusion is in the absence of authorizing provisions from the older statutes, particularly regulatory statutes such as the Federal Food, Drug, and Cosmetic Act. That is because the original purpose of inserting them—they grew up in connection with grant-in-aid statutes—was not to authorize the appropriation of some amount. It was to limit the amount that might be appropriated in their absence. They were intended to allow the authorizing committees of Congress to set an upper limit on sums approved by congressional appropriations' committees. These sections are usually captioned, "Authorization of Appropriations". A more accurate title for them would be, "Limitation of Appropriations Authorized", inasmuch as, in their absence, appropriations would be implicitly authorized indefinitely without limit. Once such a provision is included in a statute, however—the authorization being for a fixed period and a finite amount—the provision means that, unless it is extended, no further appropriations are authorized for that statute after the period has expired.

An appropriations Act creates budget authority, *i.e.*, the right of a government agency to make financial commitments, only for the fiscal year (or years) to which the Act applies. Therefore, although authorization provisions occasionally call for appropriations "without fiscal year limitation"—so-called "no-year money"—authorization provisions are usually written in terms of fiscal years. Before 1974, a common form of the accepted langauge was, "There are authorized to be appropriated [insert $ amount or the phrase 'such sums as may be necessary'] for the fiscal year ending June 30, 19.., and for each of the succeeding .... fiscal years." The Congressional Budget Act of 1974, which changed the fiscal year of the federal government to a year beginning on October 1, also added to the law a definition of the fiscal year. The current form of language authorizing appropriations, therefore, should no longer speak of appropriations for the "fiscal year ending June 30, 19.." but rather of appropriations for "fiscal year 19..".

Although an explanation of the concepts underlying the Budget of the United States is beyond the scope of this book, a draftsman needs to ground himself in them if he is to translate his clients' decisions on such esoterica as "obligations", "outlays", "advance appropriations", "advanced funding", "forward funding", "full funding", "extended availability", and so on. You should obtain a copy of the Budget and the Budget Appendix—as of this writing, the Budget for fiscal year 1981—and study, in the Budget, part 7, "The Budget System and Concepts" and, in the Appendix, part V, "Other Materials".

A common budget-related source of confusion, not discussed in the Budget or its Appendix, however, is the so-called "entitlement" program. There are at least two types of government program to which you may hear this appellation applied. One is a program in which a recipient is legally entitled, upon meeting certain conditions, to a statutorily determined share of the program's appropriation. Congress remains legally free to vary that appropriation, from year to year, as it pleases.

The other entitlement program is one, such as the AFDC program to be discussed at §3.8, in which the recipient—in AFDC, the state—is legally entitled to a statutorily determined amount of federal financial assistance—in AFDC, reimbursement for a fixed proportion of state expenditures for welfare beneficiaries and program administration—whether or not the necessary funds have been appropriated. In this second case, Congress is legally obliged to appropriate the required amounts for so long as the authorizing statute remains in force.

Congressional funding of this second type of program is analogous to its "liquidation" of amounts obligated under a government contract. To illustrate, assume that a law authorizes a federal official to enter into a contract with a private party requiring federal payment to that party of some amount. In such a case, the party's claim against the government under the contract is for the payment of a debt of the United States. The Congress is constitutionally obliged to "liquidate" the debt by appropriating whatever may be required.

You must keep this distinction in mind when you are drafting an "entitlement" program in order to ensure that you understand and draft what your client intends. Also, when drafting the second kind of program—the one obligating Congress to appropriate a statutorily determined amount—consult section 401 of the Congressional Budget Act of 1974, 31 U.S.C. 1351, wihch bars Congress from considering certain types of entitlement proposals.

§3.7. *Exercise in drafting an appropriations authorization and allotment formula.* Draft an appropriations authorization for the domestic violence bill to conform to the specifications. Then draft a section to allot the appropriation among the states. Compare your work to sections 4 and 5 of the draft bill at Appendix M.

§3.8. *State plan provisions.* State plan provisions give federal statutes a bad name. The state plan requirement for the program of Aid to Families with Dependent Children, title IV-A of the Social Security Act, consists of a single sentence that is upwards of 2,500 words long and covers eight pages of title 42 of the annotated United State Code. It contains 23 numbered paragraph (which, for some reason, the U.S.C.A. does not tabulate), and over 40 additional subdivisions. A less mind-boggling sample of the genre is included at Appendix L.

The state plan at Appendix L does lack a maintenance-of-effort provision, which is called for by the domestic violence specifications at Appendix A. One type of such provision is section 303(a)(9) of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4573(a)(9)):

> (9) provide reasonable assurance that Federal funds made available under this part for any period will be [used so] as to supplement and increase, to the extent feasible and practical, the level of State, local, and other non-Federal funds that would in the absence of such Federal funds be made available for programs described in this part, and will in no event supplant such State, local, and other non-Federal funds.

Ask yourself how a federal administrator would be able to tell if a state violates this assurance.

A second provision, which is often included in state plans, requires the plan to provide that the Comptroller General of the United States or his duly authorized representatives shall have access for the purpose of audit and examination to the records that the Secretary requires the state to keep under the plan.

If the program is one that supports construction, it was customary in the past to include in the state plan provisions one requiring the state to provide reasonable assurance to the Secretary that all laborers and mechanics employed by contractors or subcontractors in the performance of work on a project will be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C. 276a—276a-5, known as the Davis-Bacon Act). If a Davis-Bacon assurance is to be used for a new program, the state plan provision should also contain language that gives the Secretary of Labor, with respect to those labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 5 U.S.C. Appendix) and section 2 of the Act of June 13, 1934 (40 U.S.C. 276c). Reorganization Plan 14 vests in the Secretary of Labor responsibility for prescribing appropriate standards, regulations, and procedures that federal agencies must observe on federal construction. The Act of 1934 gives the Secretary of Labor similar responsibility over contractors and subcontractors employed to construct federal buildings or federally financed public works. See, for example, section 1604(b)(1)(H) of the Public Health Service Act (42 U.S.C. 3000-3(b)(1)(H)).

You should be aware that the subjection of federally assisted construction to the Davis-Bacon Act automatically subjects it, also, to the Contract Work Hours Standards Act, by virtue of a provision (section 103(a)(3) (40 U.S.C. 329(a)(3)) of the latter Act.

§3.9. *Exercise in drafting a state plan provision.* Draft a state plan provision conforming to the do-

mestic violence specifications at Appendix A (as clarified by Appendices C and D). Compare it to section 6 of the draft bill at Appendix M.

§3.10. *Provisions authorizing applications for assistance.*

1. *State plan programs.* In some state plan programs, such as AFDC, the statute merely directs the Secretary to use appropriated funds to reimburse program expenses, in a ratio determined by the statute's formula, incurred by states that have on file with the Secretary an approved state plan. This structure makes sense for a program in which all individuals in the state who meet established standards of eligibility will receive certain benefits. To the extent that these standards and benefits are in the discretion of the state, the state must be required to set them forth in its plan. Once it does so, the standards and benefits are established until the state formally amends its plan.

If, however, the program's scope is more limited and a state is expected to use the federal funds for services that will not be made available throughout the state, the state plan will not adequately reveal how the state intends to use its federal funds for a particular grant year. Such a program will often be drafted to require the state to file an annual application for grant funds that is in conformity with, but in addition to, its previously approved state plan. The application will have to set out such things as the budget covering the year for which the grant is sought, the objectives of each project, whether or not the state will charge fees for a project's services, and other information on how the state intends to conduct the program for the grant year.

The application's purpose could also be served by an after-the-fact reporting requirement, particularly if the program is one in which the Secretary has no discretion but to pay to a state that has submitted an approved plan its share of the program's appropriations. In other words, if the Secretary lacks discretion to determine how much to pay to a state on the basis of what the state's application shows that it proposes to do with the payment, there is no reason to have an annual application; amounts could as well be obligated merely under the plan, itself.

2. *Other assistance programs.* In federally assisted programs not involving a state plan, the provisions for application to the Secretary for assistance cover roughly the same ground as state plan provisions. The application will be approved only if it contains assurances of the same general kind as those required of the state under a state plan program. Because non-construction project grant programs that assist public and nonprofit private groups are the small change of the grant field, the statutory provisions governing project applications can appropriately be kept simpler than state plan requirements, and a great deal may be left to the Secretary's regulations. To do this, you will want those provisions to confer on the Secretary an explicit authority to specify the form and contents of project applications.

§3.11. *Exercise in drafting project grant and application provisions.* Draft the project grant and application provisions called for by the domestic violence specifications for the research and demonstration program. Compare your provisions with sections 7 and 8 of the draft bill at Appendix M.

§3.12. *Administrative provisions.* Many free-standing bills devote a separate section, usually captioned either "General Provisions" or "Administrative Provisions", to authorities or requirements that apply to all or some group of programs in the bill. In the case of bills to be administered by an executive department, chapter 3 of title 5 of the United States Code contains a range of general authorities, which the bill need not restate. If the bill is one that establishes an administrative agency, however, you will have to include these authorities. For a model containing a number of them, consult section 27(b) of the Consumer Product Safety Act, 86 Stat. 1228 (15 U.S.C. 2076(b)).

§3.13. *Exercise in drafting administrative provisions.* Draft those administrative provisions that should apply generally to programs in the domestic violence bill, but do not duplicate authorities conferred on the Secretary elsewhere in the bill. Compare your effort with section 9 of the draft bill at Appendix M.

§3.14. *Civil and criminal penalty provisions and other sanctions.*

1. *Noncompliance with program conditions.* Section 6(c) of the domestic violence bill at Appendix M illustrates a typical sanction for state noncompliance with a program condition: termination of the program after opportunity is given to the State for what is known as a "conformity" hearing. Some statutes, for example the AFDC law (see section 403(g) of the Social Security Act, 42 U.S.C. 603(g)) and the Medicaid law (see section 1903(g) of the Social Security Act, 42 U.S.C. 1396b(g)), impose for specified nonconformance penalties substantially less than termination of all assistance. In the absence of provisions to the contrary, however, the federal government may not recover money expended by the state for proper program purposes, even if the state expenditure is contrary to procedural requirements.

No special provision is needed to recover amounts expended by the state for purposes that the Secre-

tary determines are outside the scope of the program. The amounts are simply ineligible for federal financial participation. Nevertheless, if the state has tapped its advance of federal program funds in order to make expenditures to which the federal auditors take exception, the Secretary cannot offset the amount of the "audit exception" against future federal payments to the state unless the statute contains a provision allowing him to do so.

Finally, under the federal common law of grant administration, the court will entertain a suit by the grantor agency to compel a state to comply with its assurances and other plan conditions under a federal program for so long as the state remains in the program.

The domestic violence specifications are silent on penalties; therefore you, as the draftsman, are obliged to offer alternatives to the policy officials, along with some guidance as to their implications. For example, in mentioning the option of a reduced penalty, you would probably observe that, because the maximum grant to a state is quite small to begin with, the sanction would be unlikely to deter state noncompliance.

2. *Civil and criminal penalties.* Specifications are usually written by people not especially conversant with criminal law. You may, as a result, find specifications obscure when they attempt to describe conduct that is to be declared unlawful or the associated penalties. When delineating conduct to be declared unlawful, a central concern is the malefactor's state of mind: is it to be an element of the offense and, if so, how is it to be characterized? Although you may occasionally see variations, there are three main choices:

(1) An offense may be established without criminal intent. This is the strict or absolute criminal liability imposed by the Federal Food, Drug, and Cosmetic Act. The prosecutor need only prove that an employee of a drug company, for example, committed the proscribed acts on the company's behalf, in order for the prosecutor to make a *prima facie* case against the controlling corporate officials. It is no defense that the officials did not condone—and in fact were ignorant of—the employee's conduct. The typical way to draft a strict liability provision is illustrated by section 368 of the Public Health Service Act, 42 U.S.C. 271, which reads, "Any person who violates any [quarantine] regulation . . . shall be punished . . .".

(2) An offense may require a "generalized" criminal intent. This merely means that the prosecutor must show that the individual intended to commit the acts that he in fact committed; or, put differently, that the defendant personally committed or aided or counseled in the commission of the prohibited acts. A statute usually signals this kind of intent by characterizing the prohibited conduct as action that is performed "willfully" or "knowingly". Unfortunately, there is no generally acceptable standard for expressing this state of mind. To quote from the Senate Judiciary Committee's report on a recently proposed bill to reform the criminal code, Rept. No. 95-605, Part 1, 95th Cong., at p. 55:

Present Federal criminal law is composed of a bewildering array of terms used to describe the mental element of an offense. The National Commission's consultant on this subject identified 78 different terms used in present law. These range from the traditional "knowingly," "willfully," and "maliciously," to the redundant "willful, deliberate, malicious, and premeditated," and "knowingly and willfully," to the conclusory "unlawfully," " improperly," and "feloniously," to the self-contradictory "willfully neglects. No Federal statute attempts a comprehensive and precise definition of the terms used to describe the requisite state of mind. Nor are the terms defined in the statutes in which they are used. Instead the task of giving substance to the "mental element" used in a particular statute has been left to the courts.

Current reform efforts, as exemplified by the Model Penal Code and S. 1437, 95th Congress, attempt to reduce the terms describing the requisite state of mind to four: intentional, knowing, reckless, negligent. The term "intentional" is defined to correspond essentially to the concept of specific intent, described in the following paragraph. The term "knowing" corresponds to a generalized criminal intent, *i.e.*, a state of mind in which an individual is aware of the nature of his conduct but does not necessarily seek a particular result. "Reckless" would mean disregard by a person of a risk of which he is aware; "negligent", a person's disregard of a risk of which he reasonably ought to have been aware.

(3) Finally, there are offenses that call for a specific criminal intent. An example is section 1107 of the Social Security Act, 42 U.S.C. 1307, which reads, in pertinent part, "Whoever, with the intent to defraud any person, shall make . . . any false representation . . ." The prosecutor must prove beyond a reasonable doubt both that the defendant made a false representation, and that he did so for a fraudulent purpose.

Sometimes specifications call for imposition of a penalty on certain conduct only if an individual engages in it with knowledge that a law or regulation prohibits it. As a practical matter, unless a prosecutor can show, in such case, that the defendant, prior to the alleged infraction, had been warned about the unlawfulness of his conduct, the prosecutor's burden of proof cannot be met. The draftsman must call this problem to the attention of the policy officials.

Penalties are of two types: criminal and civil. With respect to criminal penalties, your general stock of information should include an awareness that significant procedural differences attend the characterization of an offense, in the federal system, as a misdemeanor or a felony. Under 18 U.S.C. 1, any offense punishable by death or imprisonment for a term exceeding one year is a felony; any other

offense is a misdemeanor (a term including a category of infractions known as petty offenses, for which the maximum imprisonment is six months and the maximum fine is $500). If an offense is a misdemeanor, the United States Attorney may prosecute merely by lodging against a defendant that is known as an "Information". Prosecution for a felony requires a Grand Jury indictment. Occasionally, you will see a statute that characterizes an offense as a "misdemeanor", but establishes a penalty that exceeds one year. United States Attorneys treat these offenses as indictable misdemeanors; that is, they present such cases to a Grand Jury as though they were felonies.

To establish a civil penalty, a statute should specifically announce that a civil penalty is intended. The penalty takes the form of a fine imposed on conduct that the prosecutor need prove only by a preponderance of the evidence.

§3.15. *Administrative and judicial review provisions.* A draftsman of federal legislation needs to be thoroughly grounded in the Administrative Procedure Act, now spread over several chapters of title 5 of the United States Code. The discussion that follows is not intended as a primer in the subject, but as a reminder of several aspects of the Act that can cause trouble if you ignore them.

1. *Rulemaking.* Although the APA's rulemaking section, 5 U.S.C. 553, exempts matters relating to loans, grants, and benefits, your agency may have waived this exemption, as did HEW in 1971. 36 Fed. Reg. 2532 (Feb. 5, 1971). In consequence, a draftsman's silence on the subject will cause rulemaking under grant statutes, such as the domestic violence bill, to be subject to the APA's informal rulemaking procedures. This means, at a minimum, that the agency will have to give the public an opportunity to present written views before a rule is adopted. An elaborate regulatory procedure in HEW and its successor agency requires agency publication of a notion of intent to propose regulations, followed by the receipt of public comment and, often, public hearings, followed by the publication of one or more Notices of Proposed Rulemaking and opportunities for public comment, followed by publication of a final regulation. 41 Fed. Reg. 34811-34812 (Aug. 17, 1976).

Judicial review of informal rulemaking will be available in the appropriate United States district court by virtue of 5 U.S.C. 704. Section 706 of title 5 of the Code fixes the scope of that review. The court is to set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

If the draftsman is asked to offer interested persons an opportunity for hearing as part of the administrative rulemaking process, he can do so without narrowing either the range of information that the agency may consider in formulating its rules, or the scope of judicial review. If he should provide that a given rule is ". . . to be made *on the record* after opportunity for an agency hearing" (5 U.S.C. 553(c), emphasis added), however, he will have subjected the rule to the APA's formal rulemaking procedures. This involves a trial-type hearing under 5 U.S.C. 557, in which the decision is confined to the evidence presented. Judicial review of the decision, under 5 U.S.C. 706, will cause it to be set aside unless it is supported by "substantial evidence" on the record taken as a whole.

2. *Adjudication.* Unless a statute provides otherwise, or provides for a *de novo* judicial hearing, adjudication under the APA is a formal process, subject to the "substantial evidence" test on judical review. See 5 U.S.C. 554 and 706. The APA does not extend hearing rights to the beneficiaries of a state grant program. Any such rights must come from the particular federal assistance statute or from state law. In determining what, in this regard, an agency should require of a state (or require of itself under a new grant program), policy officials find themselves pitting, on the one hand, their desire to allow the state, or their agency, the flexibility to design an adjudication procedure by regulations that may conveniently be perfected on the basis of program experience, against a need, on the other hand, to reassure beneficiaries of their rights through the expedient of detailed statutory protection. The draftsman should serve as an informed counsel in this debate.

§3.16. *Miscellaneous provisions.*

1. *Repealers.* A common drafting problem is the proper disposition of programs that a new bill is intended to supersede. For example, in 1974 the Hill-Burton hospital construction program, title VI of the Public Health Service Act, expired or, more accurately, the provision authorizing Congress to pass further appropriations for the title expired. A successor program called "Health Resources Development", in the form of a new title XVI of the PHS Act, was then making its way through Congress. It was left to the draftsman to decide whether the bill to enact title XVI should repeal title VI or leave it standing.

The first question the draftsman had to answer was the effect of a repeal on continuing legal obligations incurred under title VI. Section 609 of the Act, for example, provided (to oversimplify some-

what) that if, within 20 years of its construction, an assisted facility ceased to be used as a nonprofit hospital the government could get its money back. Would repeal of title VI extinguish this right? The answer to this question is found at 1 U.S.C. 109:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

In this case the draftsman wished to preserve existing obligations, and now saw that a simple repeal of title VI would not disturb them. Nevertheless, the draftsman knew that title VI had been much amended over a number of years, so that one could not readily tell what was in the title merely by consulting the Statutes at Large. If the title were repealed, it would become difficult, in future years, for anyone to figure out what obligations subsisted under it. By leaving the title intact, however, the draftsman could assure that the United States Code and other compilations of the Public Health Service Act would always display the title in its most recent pre-expiration form. Accordingly, the draftsman chose not to repeal it.

What happens, to consider another problem, when you repeal an act that itself repealed a predecessor act? Have you revived the earlier act? The answer (as you probably guessed) is no; a repealer is thought of as being "executed" upon enactment. Therefore its work is not undone when it is itself wiped from the books. This rule appears at 1 U.S.C. 108. "Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided."

2. *Savings provisions.* Savings or "grandfather" provisions are included in a statute to preserve rights or benefits conferred on persons under prior law. They can be extraordinarily complex. Chapter four, which deals with amendatory legislation, discusses their technical aspects.

3. *Severability clauses.* A typical severability (or "separability") clause reads something like this:

> If any provision of this Act, or the application of that provision to any person or circumstance, is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby.

It is debatable whether such a provision can affect the outcome of a judicial determination, or whether one should want it to. If a court finds some part of a statute unconstitutional, it may be expected to leave the remainder of the statute untouched, even without the clause, unless its decision has left the statute in tatters. If so, one would expect the court to strike down the entire statute, notwithstanding a severability clause. If a court finds the application of a provision unconstitutional, it may ordinarily be expected to narrow the provision to valid applications without the clause's help.

Most specifications will not call for the addition of the clause; the draftsman is well advised not to volunteer one.

4. *Sunset provisions.* Sunset provisions are comparatively new. They aim at forcing congressional review of a program that might continue to be funded beyond its need. The Congress is considering several bills (S. 2, 96th Congress, H.R. 2, 96th Congress) to subject a range of government programs to review every ten years. If one of these bills is enacted, you will need to consult it to see if a new program should be synchronized with the appropriate "sunset reauthorization cycle".

In the absence of general sunset legislation, the domestic violence bill includes a specific sunset section, section 11. Please read the note on this provision on page 2 of Appendix F.

5. *Authority to issue rules.* A number of statutes contain provisions similar to section 701 of the Federal Food, Drug, and Cosmetic Act. "The authority to promulgate regulations for the efficient enforcement of this Act, except as otherwise provided in this section, is hereby vested in the Secretary". When is such a provision necessary?

If your concern is merely that the agency head be empowered to govern the performance of agency employees in implementing the new statute, 5 U.S.C. 301 already authorizes him to issue the needed regulations. If you wish to confer on the agency head the authority to interpret the new statute, this authority is inherent in the statute's mandate that he administer it.

But what if you want to vest in the agency head substantive rulemaking authority? For example, assume that you wish him to have power to expand the meaning of the defined term "domestic violence" in section 2(1) of the bill by issuing rules having the effect of law. For this, you need an explicit statutory provision. But the type of general provision quoted is probably too obscure for the purpose. Far better would be a clear grant of authority in the definition itself, *i.e.*, "The term 'domestic violence' means . . . and such other threat or infliction of physical injury, upon or by such other individual, as the Secretary by regulation may prescribe."

§3.17. *Effective date provisions.* A bill is effective when enacted, *i.e.*, upon the day it is approved by

the President; or, if the President does not act, upon the close of the tenth day (excluding Sunday but including any holiday) after the day it is "presented" to him; or, if the President vetoes the bill, on the day the veto is overriden. An "effective date" provision should be used only to interfere with this rule. For example, a statute conferring benefits retroactively will need an effective date provision prior to enactment. A more common reason for effective date provisions, of course, is to delay the applicability of one or more sections of the bill. Be careful with these. Provisions that read, "This Act is effective six months after enactment" invite confusion. More precise is, "This Act is effective upon the expiration of six calendar months following the month in which it is enacted," or "This Act is effective upon the close of the 180th day following the date of enactment".

Although burdensome to codifiers, the tying of an effective date provision to the occurrence of an administrative event, rather than to a particular time, often makes the most sense for non-regulatory programs. For example, if the domestic violence bill were enacted, one might suppose that, prior to its expiration with the close of fiscal year 1982, HEW or its successor agency would submit to Congress a bill to extend and amend it. These amendments would not be intended to govern the use of funds appropriated for fiscal year 1982; they would be intended to apply to 1983 appropriations, though, whenever the bill containing those appropriations happened to be enacted. For these reasons, the effective date of a domestic violence extension might appropriately be cast as follows: "The amendments made by this Act are effective with respect to grants made from appropriations for fiscal years beginning after fiscal year 1982."

Like repealers, effective date provisions can present highly complex technical issues in amendatory legislation. Some of these complexities are discussed in chapter four.

CHAPTER FOUR
Amending a Statute

§4.1. *General considerations.* A large part of a draftsman's skill resides in his substantive legal knowledge. A draftsman must always be alert to his legal surroundings—the measures already on the books—if his draft is adequately to take them into account. Nowhere is this more true than in the drafting of amendments, where there is no ready substitute for knowledge of the subject matter.

This is a serious problem for the novice because most legislative drafting for the federal government is of bills to amend existing statutes. Assume, for example, that you are asked to prepare amendments to section 218 of the Social Security Act, 42 U.S.C. 418, which deals with voluntary agreements for the social security coverage of state and local employees. You may not realize that this provision is cited by at least six other sections or sectional subdivisions buried in a title that runs to several hundred pages, and is also referred to at least eight times in various parts of the Internal Revenue Code and at least six times in two free-standing public laws. The section, itself, will confront you with 124 tabulated subdivisions and numerous additional untabulated subdivisions.

A draftsman not intimately familiar with the operation of a complex law cannot acquire competence to draft amendments to it merely by devoting to it a day or two of study. Yet the time for writing a bill is often constrained. The draftsman is without the leisure to embark with each new drafting assignment upon a voyage of discovery over a sea of uncharted substantive law. The full-time practitioner of legislative drafting meets this difficulty by selecting areas of the law in which to specialize.

But what are you to do if you are compelled to draft amendments to a statute with which you are unacquainted? The best advice is to apply the First Rule of Statutory Construction: READ THE STATUTE. If the statute turns out to consist of 700 pages of closely printed text, *e.g.*, the Public Health Service Act in the most recent compilation, apply the Second Rule of Statutory Construction: CONSULT AN EXPERIENCED PROGRAM ATTORNEY. He may tell you that you can remedy your ignorance merely by reading a relevant title, or portion of a title, in conjunction with the Act's general definitions. Also, if the authors of the specifications are technicians who have substantial experience with the statute to be amended, ask them to direct you to the portions of the statute that they think should be amended in order to comply with the specifications. In most cases, your problem will be not in eliciting their cooperation, but in preventing them from trying to draft the bill for you.

At all events, make sure your draft bill is reviewed by program technical staff and the program attorney responsible for interpreting the statute that you seek to amend.

Drafting amendatory legislation is not fundamentally different from drafting a free-standing bill. All of the steps that precede the actual writing—policy review, issue refinement, preparation of specifications, clarification of specifications, the making of a drafting outline—are the same.

§4.2. *Exercise in developing a drafting outline.* For training purposes, assume that the Domestic Violence Prevention Act at Appendix M has been enacted into law. You are assigned to prepare amendments to the Act that conform to the legislative specifications at Appendix N.

If you find the specification clear, you are ready to make a drafting outline. The outline is your guide to the sections of the Act that you will need to amend. Such an outline is useful as a checklist, particularly if the amendments are extensive and the statute voluminous. The outline should show the sections of the Act that you propose to amend and how you propose to amend them. Essentially, it is a translation of the legislative specifications into a drafting guide.

For example, item 5 of the legislative specifications calls for changing the Act's references to the Secretary of Health, Education, and Welfare to the Secretary of Health and Human Services. Your drafting outline might read:

"Amend §3(4) to change Secretary of HEW to Secretary of HSS. References in other sections are correct."

When you have completed your drafting outline compare it to the one at Appendix O.

§4.3. *Structuring an amendatory bill.* After you have finished the drafting outline you are ready to design the bill. The inexperienced draftsman is

tempted to arrange his bill to follow the sequence of the law that he is amending. For example, he may begin by amending the Act's "Findings and Purposes" section, because it is the first section needing amendment. Next, he might amend the Act's definitions section. Then, he might extend the Act's authorization. Finally, he might establish the limitations on obligating funds for child abuse prevention activities.

This structure deprives the bill of internal coherence. For example, the specifications at Appendix N call for amending the Act to allow 15 percent of its appropriations to be used for programs aimed at protecting children. This requires amendment of the sections entitled "Definitions", "State Plan Requirements", and "Research and Demonstration Projects". Ordering those amendments in the bill as they are ordered in the Act, and separating them from each other by unrelated amendments, will make it difficult to discover the draftsman's purposes and how he carried them out. The amendment adding the term "child abuse" to the definitions section of the Act will be inscrutable because the term would not appear again until the amendments to the state plan program.

Such a structure, moreover, may place minor technical amendments in a bill's introductory sections while burying major program changes in the rear.

Good drafting practice calls for grouping amendments by subject. The child abuse amendments could, for example, appropriately be handled by a single provision of the bill making all of the changes, or by two provisions, the first of which defines "child abuse" as part of the state plan program and the second of which authorizes project grants to prevent child abuse.

Because it is common for a congressional subcommittee to address policy issues within the framework of the language of the bill in which they are embodied, modular construction of this sort often facilitates a bill's consideration. A subcommittee may even wish to discuss or vote on the various sections during a formal reading of the bill. If so, subcommittee members and attendant staff would have difficulty following a single concept that is spread among widely scattered amendments.

Modular construction simplifies the draftsman's task if the subcommittee chooses to accept some but not all of the amendments proposed in the bill. The following example illustrates this. Under the Social Security Act and the Federal Insurance Contributions Act, as both were in effect during 1979, an individual who performed services outside of the United States as an employee of a foreign business could enjoy social security coverage, regardless of his citizenship, if the foreign business were an incorporated subsidiary of a domestic corporation. The critical language in the Social Security Act (in section 210(a)) read:

> The term "employment" means any service performed . . . outside the United States by a citizen of the United States as an employee . . . of a foreign subsidiary (as defined in section 3121(l) of the Internal Revenue Code of 1954) of a domestic corporation (as determined in accordance with section 7701 of the Internal Revenue Code of 1954) . . .

The related FICA provision (section 3121(l)(8) of the Internal Revenue Code) required the foreign subsidiary to be a corporation 20 percent of whose stock was owned by the domestic corporation.

The Social Security Administration decided to propose amendments to dispense with the corporate requirement for both domestic and foreign businesses and to relax the degree of ownership that the domestic business was obligated to maintain in the foreign business. Into how many sections should the draftsman divide these amendments?

The draftsman has four reasonable choices:

1. He could include all of the amendments in a single section of his amendatory bill.

2. He could use three sections in order to deal separately with the domestic corporation rule, the foreign corporation rule, and the ownership rule.

3. He could divide the amendments into two sections, one dealing with the foreign and domestic corporation rules and the other with the ownership rule.

4. He could divide the amendments into two sections, one dealing with the domestic corporation rule and the other dealing with the foreign corporation and ownership rules.

Selecting among these possibilities calls for anticipating the problems that the amendments will encounter in Congress and the executive branch. The draftsman's decision, as shown in Appendix P, was number 4. It reflects a judgment that repeal of the corporate requirements for domestic corporations is less controversial than repeal of the ownership and foreign corporate requirements. Separating the proposals into different sections simplifies redrafting if only one of the proposals is adopted.

The draftsman's decision reflected his guess that the responsible subcommittee would see the most important distinction to be between the treatment of American companies and foreign companies, not between the corporation rules and the ownership rule. He therefore rejected choices 2 and 3.

If the way in which a draft bill groups issues affects their substantive disposition, the draftsman's choice in this case has tactical implications. He has made it easy for the responsible congressional committee to see repeal of the domestic corporation rule as independent of the changes involving foreign corporations, and therefore to vote separately upon them. This may strengthen the prospect that Congress will repeal the rule respecting domestic business, but at the risk that it will reject the amendment repealing the corporation rule for foreign business. Had the draftsman used a single section to contain all of the changes, he might have improved the chances of eliminating the foreign corporation rule. But use of a single section, mingling the more controversial repealers of the foreign corporation and ownership rules with the more acceptable repealer of the domestic corporation rule, runs the risk of losing all of the proposed amendments.

Choice 4 entails amending section 210(a) of the Social Security Act twice: in the bill's section dealing with the domestic corporation requirement and in the section on foreign businesses. Appendix P shows how this is done. The second amendment to section 210(a) assumes enactment of the preceding amendment to the section, and expressly warns the reader that such is the case (*i.e.*, "Section 210(a) of the Social Security Act, as amended by section 129 of this Act [*i.e.*, the instant bill, styled as the Social Security Amendments of 1980], is further amended . . ."). Nevertheless, to eliminate unnecessary redrafting, the draftsman in fact drafted the second amendment so that it stands independently of the first amendment. In the unlikely event that the responsible subcommittee disapproves the first amendment but adopts the second, the second amendment could be incorporated in the subcommittee bill merely by renumbering it and striking out the reference to the section 129 amendment.

Modular construction eliminates references in a bill that initially appear inexplicable or erroneous. A common sight, in bills prepared by novice draftsmen, is a provision that refers to a section of the Act being amended that, on inspection, seems not to exist. Eventually, the reader discovers that the missing section is to be added by the amendatory bill itself, which section the draftsman has carefully placed twenty pages further on.

To avoid this confusion, early amendments should not anticipate later ones; if they do, they will not be readily intelligible. Adhere to this rule even if it leads to practices that seem odd to you. For example, assume that you are to amend the following list:

(1) public hospitals,
(2) public schools,
(3) institutions of higher education, and
(4) agencies of State or local government.

There are to be two amendments to the list, the first to add "nonprofit private hospitals" after paragraph (1) and the second to add "nonprofit private schools" after paragraph (2). You conclude that the amendments must be made by different sections of your bill. How do you do it?

A beginner might draft the amendments something like this:

Section 1. Paragraphs (2), (3), and (4) are respectively redesignated as paragraphs (3), (5), and (6), and there is added immediately after paragraph (1) the following new paragraph:

"(2) nonprofit private hospitals,".

Sec. 2. There is added immediately after paragraph (3) the following new paragraph:

"(4) nonprofit private schools,".

This draft has two flaws. First, the reader of section 1 will be unable to understand why paragraphs (3) and (4) were renumbered "(5)" and "(6)" rather than "(4)" and "(5)". He will not know whether this is an error or an indication that section 1 is not self-contained. Second, a reader of section 2 will be uncertain whether its reference to "paragraph (3)" is to pre-existing law ("(3) institutions of higher education") or to the law as amended by section 1 ("(3) nonprofit private hospitals"), although an understanding of the reference is essential to the correct placement of the amendment made by section 2.

Here are the two sections redrafted correctly:

Section 1. Paragraphs (2), (3), and (4) are respectively redesignated as paragraphs (3), (4), and (5), and there is added immediately after paragraph (1) the following new paragraph:

"(2) nonprofit private hospitals,".

Sec. 2. Paragraphs (4) and (5) (as redesignated by section 1 of this Act) are respectively redesignated as paragraphs (5) and (6), and there is added immediately after paragraph (3) (as redesignated by section 1 of this Act) the following new paragraph:

"(4) nonprofit private schools,".

This practice helps a reader to understand an amendment, if he studies it in conjunction with the law being amended, without his having to know what in the bill is yet to come. Follow it even within a single amendatory section, as suggested in §4.6.1.

Remember that the order of your provisions will usually not alter their legal efficacy. In drafting a section to amend an Act, your primary aim is to place the various parts of the amendatory language in the sequence that makes their impact most understandable.

§4.4. *Exercise in structuring an amendatory bill.* Draft an outline of your bill complete with section headings. When you have finished, compare your outline with the one at Appendix Q.

§4.5. *Exercise in drafting an amendatory bill.* Using the specifications at Appendix N, the drafting outline at Appendix O, and the bill outline at Appendix Q, draft the bill. When you have finished, compare your bill with the one at Appendix R. Some of the features of the bill at Appendix R may puzzle you. You may find the explanation in §4.6.

§4.6. *Discussion of selected features of an amendatory bill.*

1. *The sequence, within a section of an amendatory bill, of amendments to an Act.* Section 2 of the draft bill at Appendix R contains four groups of amendments needed to incorporate child abuse activities into the Domestic Violence Prevention Act. The first two groups would amend the Act's provisions governing the state plan program and the research and demonstration program. The third group would amend the Act's section on definitions. The fourth group is a single amendment to the Act's findings. Before reading on, see if you can figure out why this order was selected.

The order is intended to acquaint the reader with the amendment's operative provisions first, because they are the most critical part of the section. After the reader learns that federal financial assisance may be used, within the 15 percent limitations, to aid victims of child abuse, he is then ready for a detailed explanation of what child abuse is. The reverse order, on the other hand, leaves the reader with a definition whose purpose has yet to be explained.

This discussion may confuse you if you remember the explanation in §2.6 about why definitions are often placed at the beginning of a bill. The section points out that a free-standing bill with numerous definitions is better understood if the reader learns early which terms have special meanings. But a definition in an amendatory bill is on a somewhat different footing. The reader of an amendatory bill does not start with a clean slate. He is presumed to be familiar with the Act that is to be amended. In these circumstances he would probably prefer first to learn the purpose of the amendatory section containing the definition. Only then would he wish to study the definition in order to understand that purpose in detail. Moreover, the definition will ordinarily be physically adjacent to the language it affects. Therefore, he will learn immediately after reading the operative provisions that they contain a concept that is specially defined. This would not be the case if he were to read a free-standing bill whose definitions were aggregated at the end.

Finally, the amendment to the Act's findings was placed at the end of section 2 because an Act's findings are without the independent significance of operative provisions. Consequently, changes in them are merely conforming amendments. Sometimes, of course, conforming amendments cannot be relegated to subordinate positions in a bill. For example, in the draft bill at Appendix R, the redesignation of paragraphs (3) through (10) of section 6(a) of the Act assumes a prominent position within section 2 of the bill because of the need first to make a hole in the section into which the new paragraph (3) will fit. If you were to reverse the order of subparagraphs (A) and (B) of section 2(a) in order to give the new paragraph (3) greater prominence, you would discover that you have created an ambiguity.

2. *Amendment by restatement.* Section 2(c) of our amendatory bill includes child abuse within the domestic violence definition by restating the entire definition. This is the clearest way to display the new format. It has, however, the drawback of obscuring what the amendment would change. Compare the section with the following legally equivalent alternative:

> (2) Paragraph (1) of section 3 of that Act is amended—
>
> (A) by inserting a dash after "means",
>
> (B) by adding as a subparagraph (A) after that dash so much of the text of that paragraph (1) as follows "means",
>
> (C) by striking out the period at the end of subparagraph (A) (as so added by the preceding subparagraph) and inserting; "or" instead, and
>
> (D) by adding after that subparagraph (A) the following new subparagraph:
>
> "(B) child abuse as defined in paragraph (2)."

The alternative has the advantage of making clear to one who examines the unamended Domestic Violence Prevention Act precisely what change is being made in the domestic violence definition, without subjecting him to the necessity of reading the new definition against the old one searching for altered language. The disadvantage of the alternative to one reading merely the proposed amendment, is that it makes less clear than the first alternative what the amended domestic violence definition will provide.

A further example of the considerations underlying a draftsman's choice of the technical means best suited to effecting an amendment is in section 3 of the amendatory draft bill. A more concise change would be: "Section 4(a) of the Domestic Violence Prevention Act is amended by striking out 'two' and inserting 'five' instead." Even a sophisticated reader would be hard put to tell the effect of an amendment in this form without examining current law. A different way of making the change would be: "Section 4(a) of the Domestic Violence Prevention Act is amended to read as follows:

"Sec. 4. (a) For the purpose of carrying out this Act there are authorized to be appropriated such sums as may be necessary for fiscal year 1983 and each of the two succeeding fiscal years."

[OR]

"Sec. 4. (a) For the purpose of carrying out this Act there are authorized to be appropriated $20,000,000 for fiscal year 1980, and such sum as may be necessary for each of the five succeeding fiscal years."

The drawback of the first shown section 4(a) is that it erases the history of the appropriations authorization, which some find useful to preserve in the statute. The alternative section 4(a) has, on the other hand, the peculiarity of asking the Congress to reenact three years of an appropriations authorization that have already been funded. Moveover, it leaves unclear, without an examination of the current 4(a), how long an extension is being proposed.

The compromise is to write an amendment striking "two succeeding fiscal years" and inserting instead "five suceeding fiscal years". By striking out and replacing a little more than is legally essential, the draftsman assists an experienced reader to deduce quickly what the amendment would do.

A note of caution is in order on substituting new for existing provisions. By way of illustration, let us say that you are instructed that policy officials have decided that the United States should assume the costs of federal safety inspection of certain manufacturers. Upon examining the governing statute you find that these costs are now imposed upon manufacturers, in the form of inspection fees, by a subsection of a section to which, in any event, you intended to add a new subsection authorizing federal inspectors to examine business records kept on inspected premises. In order to avoid redesignation, you decide to put the new records inspection provision into the hole you will create by removing the inspection fee provision. You may be tempted to write: "Subsection X is amended to read as follows:", and then set out your new records inspection language. This is grossly misleading! Whenever new material is essentially unrelated to the material it is to replace, the proper form is as follows: "Section X is repealed. There is added as a new section X the following:". This signals the reader that he is not looking at a revised version of the current section X. (Note, though, that there are other hazards in filling in a place that is still warm. See §4.7.)

3. *Conforming amendments.* Section 4(a) of our amendatory bill would recognize the enactment of the Department of Education Organization Act P.L. 96-88, by vesting in the Secretary of Health and Human Services the authority vested by the Domestic Violence Prevention Act in the vanished Secretary of Health, Education, and Welfare. It is a species of conforming amendment frequently seen in federal statutes. Strictly speaking, many of these revesting amendments are unnecessary. For example, section 509(b) of P.L. 96-88 provides:

"Any reference to the Department of Health, Education, and Welfare, the Secretary of Health, Education, and Welfare, or any other official of the Department of Health, Education, and Welfare, in any law, rule, regulation, certificate, directive, instruction, or other official paper in force on the effective date of this Act shall be deemed to refer and apply to the Department of Health and Human Services or the Secretary of Health and Human Services, respectively, except to the extent such reference is to a function or office transferred to the Secretary [of Education] or the Department [of Education] under this Act."

Therefore, the references in the Domestic Violence Prevention Act to the Secretary of HEW must be read as references to the Secretary of HSS. Why did the author of the specifications call for this amendment?

The Domestic Violence Prevention Act's references to the "Secretary of Health, Education, and Welfare" are merely *deemed* by P.L. 96-88 to refer to the Secretary of Health and Human Services. The actual statutory language of the DVP Act is left unchanged. Although this is of no legal consequence, it can be confusing, or later become so. This type of confusion was caused in the Public Health Service Act by Reorganization Plan No. 3 of 1966, which transferred all of the functions of the Surgeon General of the Public Health Service to the Secretary of HEW, but changed none of the innumerable references to the Surgeon General that appeared in the Public Health Service Act. In subsequent years, however, amendments were enacted with references to the Secretary. The PHS Act therefore now appears to vest some functions in the Secretary and some in the Surgeon General; in fact, the Surgeon General has no statutory authority although such an official still exists.

The draftsman has a special responsibility to ensure that technical and conforming amendments are so designated and not mislabeled. Nothing will damage a draftsman's credibility with congressional staff as quickly as his appearing to conceal policy changes by calling them "technical amendments." A draftsman's integrity, as well as his reputation for integrity, must be beyond reproach in this regard. Such a ploy would in any event almost certainly be discovered before the bill is enacted, thus not only impugning the draftsman's character but also destroying any reputation he may have for intelligence.)

4. *Transitional and effective date problems.* Extensions and other amendments of programs of federal financial assistance to states or other entities are usually made effective with the beginning of a fiscal year or with respect to appropriations for a fiscal year. Regulatory statutes and statutes that confer benefits or impose burdens on individuals often call for more sophisticated treatment. Appendix S includes a particularly complicated sample of such treatment, a set of provisions so involved that they were placed in a separate title, title II of the statute, the Color Additive Amendments of 1960, P.L. 86-618. Title I of the Color Additive Amendments consisted of amendments to the Federal Food, Drug, and Cosmetic Act the effect of which was governed by title II. The provisions in title II, because they were transitional, were not made amendments to the FFD&C Act, but were instead free-standing.

Transitional provisions are a form of split amendment, alluded to in §2.2. The amendments to the FFD&C Act in title I of P.L. 86-618 are unconditional on their face. For years after their enactment, compilations of the FFD&C Act were misleading on color additives. Until the transitional period had been exhausted, conduct that the Act declared criminal was, under those free-standing transitional provisions outside of the Act, declared authorized.

The alternative approach to transitional provisions is to include these provisions in the basic statute. Those who think that this solves the problem may wish to glance at a section in which this was done: section 215 of the Social Security Act, 42 U.S.C. 415, a provision that looks like the draftsman's version of Finnegan's Wake.

In the first example, the color additives amendments, the draftsman did not wish permanently to complicate the FFD&C Act by weaving into it transitional matter of purely temporary interest. In the second example, the results of the 1977 amendments to the SS Act, the draftsman felt that the duration of the transitional period—five years for large numbers of potential social security beneficiaries—justified the complexity entailed in writing transitional provisions that were integral to the underlying statute. I know of no way to obtain the advantages that the draftsmen sought in these cases without, in the first example, suffering the disadvantages of split amendments or, in the second example, complicating the underlying statute with material that will soon become obsolete.

§4.7. *Some practices to avoid.* You have seen ways in which to amend an Act. The following discusses some of the ways not to.

1. *Unnecessary redesignation.* In his *Notes on Legislative Drafting* (REC Foundation Inc. 1961), James Peacock called redesignation an "'abominable practice . . . contributing its so unnecessary complexities." In our draft amendatory bill at Appendix R, Peacock would probably have added the new state plan paragraph on child abuse to the end of the Domestic Violence Act's existing state plan provisions or else designated it as paragraph (3a) of that Act. Had the draft bill repealed one of the Act's state plan provisions, he would not have closed the gap by renumbering the provisions following it. His position is stated succinctly: "redesignation should be totally scrapped as a legislative drafting technique".

Few professional draftsmen of federal legislation would go this far. Nevertheless, the renumbering or relettering of provisions of current law can create confusion. If the redesignated provision is referred to in other laws, the draftsman who fails to correct those references will mislead individuals using those other laws. If the provision is an important one, he will also have rendered obscure or misleading references in innumerable reprints, digests, texts, opinions, regulations, and so forth. Consider the havoc it would create, for example, if section 501(c)(3) of the Internal Revenue Code of 1954, dealing with organizations eligible for exemption from income tax, were periodically redesignated.

It is no answer to use a catchall provision, such as, "Section 210(a) of that Act is amended by striking out paragraph (3) and redesignating paragraphs (4), (5), and (6), and any references thereto contained in that or any other Act, as paragraphs (3), (4), and (5)." As Peacock points out:

> But no draftsman can, and, as far as we know, none has even tried to accomplish the impossible task of assuring that he has run down all possibly existing citations or references anywhere in the whole wide legal and administrative world. (At p. 42)

The other side of all this is the desirability of having a bill's provisions in the sequence that best ensures their being found and understood, and having their designations logically reflect that sequence. It will also cause confusion, if one scrupulously refuses to redesignate provisions of a statute that is much amended, to see a sequence like this: (1), (3), (3a), (3a-1), (3aa), (5), etc.

The best advice I can give is that the larger the subdivision and the older the statute the more you should try to avoid redesignation. No draftsman in his right mind would renumber section 162 of the Internal Revenue Code of 1954, which deals with trade and business deductions, except in the course of a comprehensive revision of the tax code. On the other hand, there is probably little risk in redesignating a paragraph or subparagraph of a recently enacted law with which the draftsman has had experience. That is why you will find redesignations in the draft bill at Appendix R.

2. *Amending laws in substance but not in form.* Do you remember the poultry that turned out to be domesticated rabbits? If not, reread the enrolled bill at Appendix I. The least of the bill's sins is the quaintness of its definitions. Far more serious is the bill's failure to amend expressly the statute that it amends by necessary implication. Had the enrolled bill become law, there would be no whisper of a suggestion in the Poultry Products Inspection Act to warn the reader that the Act's scope included rabbits.

Amendatory techniques can also make it very difficult for anyone to understand exactly how the basic statute, as amended, would operate. The operation of the Poultry Act, even with a hidden scope including rabbits, is comparatively straightforward. More complicated statutes, amended in technically undesirable ways, can be far less penetrable.

A special and often offensive class of amendments begins with the words, "Notwithstanding any other law". What the words usually tell you is that the draftsman is seeking a specific result—*i.e.*, overcoming conflicting provisions—but has failed to integrate his amendment with other relevant statutes. This approach can be useful if taken with care. All too often, though, the draftsman is a little like the hunter who fires at anything that moves and then checks to see what he has killed.

To strain the simile, he is also a hunter who uses an intangible bullet and thus leaves no visible wound on his victim as evidence to others of his marksmanship. This is true even if the amendment specifically cites the sections it affects. The National Housing Act offers a good example of this, doubtless attributable to the exigencies of the political process. If an attorney not specializing in housing law were to research the maximum rate of interest that a home mortgage is allowed to bear in order to be insurable by the Secretary of Housing and Urban Development, the National Housing Act, which establishes the program, will inform him unambiguously in section 203(b)(5), that it is six percent. What the Act will not tell him is that Public Law 90-301, an obscure statute originally introduced in 1968 to amend the veterans' home loan program, contains a section that proclaims, "Notwithstanding the provisions of [section] 203(b)(5) . . . the Secretary . . . is authorized . . . to set the maximum interest rates . . . at not to exceed such per centum per annum . . . as he finds necessary to meet the mortgage market . . .". Public Law 90-301 has left no mark on the statute that it has implicitly amended.

3. *Amending amendments.* Avoid amending amendments. If a statute has added new language to a second statute and you wish to amend the added language, amend the language as it appears in the (now amended) second statute, not as it appears in the statute that added it. The reason for this is that the amendment made by the first statute is considered to be "executed" upon its effective date. This principle was discussed in connection with repealers at §3.16.1, but has a broader application. In theory, an executed statute is not amenable to amendment because it is not of continuing effect; it does its job and melts away. This does not mean that an agency will ignore an amendment to its basic statute merely because it is cast as an amendment to an amendment of that statute. One does not tempt the wrath of Congress merely to cultivate the scholasticism of statutory construction. Nevertheless, amend the underlying statute, rather than amendments to it, if for no other reason than to demonstrate your awareness of the nicer practice.

CHAPTER FIVE

Some Notes on Style and Usage

§5.1. *Characteristics of legislative drafting style.* Legislative prose differs from most other prose:

- It is generally in the imperative mood.
- It depicts, rather than evokes, its images.
- It is not discursive; that is, it focuses on specific requirements and conditions, the reasons for which it does not explain.
- It does not seek to entertain or otherwise engage the recreational interests of the reader.

In the world of expository writing, its style is cousin to that of the assembly instructions included with children's swing sets. It takes special pains to be precise, regardless of the cost to other literary values.

You began to develop your own drafting style when you performed the written assignments in the preceding chapters. This chapter is to help you to refine it, primarily by guiding you toward writing habits that reduce the risk of ambiguity, the principal bane of legislation (and assembly instructions).

§5.2 *Consistency of expression.* The most important of these habits is that of expressing like ideas in like ways.

For example, section 5(a)(2) of the bill at Appendix M reads in part:

> (2) From such available sums the Secretary shall first allot to each State the amount of $100,000. He shall then allot the remainder of those sums among the States in proportion to their populations . . .

This could have been written as follows:

> (2) From such available sums the Secretary shall first allot to each State the amount of $100,000. He shall then allocate the remainder of the money among the States in proportion to their populations . . .

But the alternative is bad on several counts. Inasmuch as the Secretary was told first to "allot", the reader is compelled to construe the paragraph's subsequent instruction to "allocate" in order to determine whether the allocation function is in some way different from the allotment function. Then, also, the reference to "money", while not confusing in context, needlessly introduces a word not previously used in the bill. If "sums" does the job in the first sentence, it and not "money" should be used in the second sentence.

Why then, you may ask, does the original section speak of "available sums", but of "the amount of $100,000"? Should it not read: "From such available sums the Secretary shall first allot to each State the *sum* of $100,000"? No, because "sums" was first used to refer to the entire appropriation to be allotted. It was marginally clearer, therefore, to use a different word, "amount", to mean a *part* of the "sums". This last usage illustrates a corollary of the rule of expressing like ideas in like ways: do not use the same terms to describe different ideas. For example, if you draft a bill to govern the labeling of medical devices, you should not write: "A person shall not affix or cause to be affixed to any device any statement, information or device in such terms as to render it likely . . .". The use of "device" in different senses is misleading. It is an elegant bit of poetry for Shakespeare's Berowne to declaim, "Light, seeking light, doth light of light beguile", but it is an inelegant model for the legislative draftsman.

§5.3. *Avoiding vague modifiers.* Modifiers, such as adjectives, adverbs, and clauses serving the same purpose, enrich the meaning of nouns and verbs. They are as essential to the drafting of legislation as they are to other forms of writing. In drafting, however, they can cause endless legal difficulties if they are used carelessly. The reason for this is that a modifier typically ascribes to a noun or verb a characteristic that the modifier does not precisely define. For example, section 3(1) of the draft bill at Appendix M defines domestic violence as involving the infliction of "physical" injury. Those who must administer the statute and those who are intended to benefit from it must ascertain what injuries qualify as "physical".

Fortunately, the line between harm that is physical and harm that is "only" psychological is about as clear as most distinctions in the law and therefore should create no insuperable interpretive or administrative difficulties. Such would not be the case if the bill's services were confined to those who had suffered "serious" physical injury. The word "serious" is so vague that it would add to the administrative burden of the agency and otherwise

multiply the points of controversy between the agency and those that the statute affects.

- It would compel the agency to define the term "serious" by regulation.
- It would open the agency to legal action to test that definition.
- It would be a constant source of friction between the agency and those whose injuries the agency refuses to consider "serious", despite their seriousness to the victims.

Often, these consequences are knowingly accepted by the administering agency or Congress as the price of giving the agency the opportunity to exercise a flexible judgment, in the light of its experience, as to the kinds of cases that a statute should reach. A draftsman may seek a degree of vagueness for reasons of policy; unnecessary vagueness should not be inflicted on his client because of the draftsman's ineptness.

Every modifier that you use in a draft bill will, upon the bill's enactment, call for some sort of administrative judgment. Other things equal, therefore, the fewer the modifiers the easier is a statute to administer. Thus, if a statute must determine the legal rights of a very large number of people or organizations—the Internal Revenue Code or title II of the Social Security Act are examples of such statutes—you must try to avoid including in it rules requiring the exercise of judgment. Action must be required to take place within, for example, "30 days" not within "a reasonable time". The Code's concepts of "ordinary and necessary expenses" (for trade and business deductions) and a "reasonable allowance" (for depreciation) have supported generations of lawyers and regulations writers.

Remember that an inflexible rule is not unreasonable merely because it is arbitrary.

§5.4. *Exercise in analyzing defective language.* Read the following regulatory provision, 35 CFR §61.333, and write a brief analysis of its defects.

During the time when a person found to be infected with a venereal disease is undergoing treatment, he shall refrain from committing any acts or deeds that would permit the spread of the disease to other persons.

When you have completed your written analysis, examine it in light of these questions:

"During the time when a person found to be infected with a venereal disease is undergoing treatment."

Does this mean only while he is in the physician's office, or does it include the entire period during which he suffers from, and receives treatment for, the disease?

If an individual declines treatment, or after he abandons it, does the regulation's prohibition apply to him?

"he shall refrain from committing any acts or deeds"

In the course of speading the disease, how is one to distinguish between one's "acts" and one's "deeds"?

"that would permit the spread of the disease to other persons"

Does the regulation prohibit an infected person from driving an infected friend home to his, the friend's, wife? to visit his fiance? to visit a brothel?

General considerations

Do you think the draftsman asked the policy officials why they were indifferent to an infected person's spreading the disease when he was *not* undergoing treatment? Do you think they were indifferent?

* * *

The provision illustrates a number of common drafting errors. It is ambiguous, in some respects inappropriately vague, in other respects overspecific, and prolix. Redraft it. Now compare your redraft with the following:

A person found to be infected with a venereal disease shall not act so as to spread that infection to another person.

§5.5. *Drafting in the singular.* Because a public law ordinarily applies to classes, *e.g.*, all qualified applicants or all authorized grants, rather than to some single individual or object, it seems natural to draft in the plural. A typical example of such drafting is this:

The Secretary shall not award grants, or enter into contracts, in excess of $25,000 without the approval of the National Advisory Committee.

The use of the plural, unfortunately, is a major source of ambiguity in draft language. In the example, does the $25,000 restriction limit the size of grants in the aggregate or merely the size of each grant? Similarly, does it limit the aggregate size of contracts or each contract? Or does it, perhaps seek to limit the sum of all grants and contracts taken together?

When the provision is redrafted in the singular these questions disappear:

The Secretary shall not award a grant, or enter into a contract, in excess of $25,000 without the approval of the National Advisory Committee.

As redrafted, the provision, although in the singular, will be read to reach all grants and contracts under the rules of construction discussed at §3.4.1.

§5.6. *All about sex.* The suggestion that you draft in the singular will exacerbate a newly discovered drafting problem. In recent years, legislative draftsmen have been pressed by groups concerned with the invidious effects of gender-based discrimination to avoid the use of masculine personal pronouns in references intended to include women. The suggested alternatives usually involve either writing in the plural or using constructions such as "his or her". Neither alternative is especially satisfactory. The former leads to ambiguity; the latter, to sentences so ludicrous as to suggest an ironic intent.

The same difficulties arise from words that use "man" or "men" as a prefix or suffix to designate people of either sex. Neologisms have flowered (if that is the word), some meant quite seriously (such as "chair" or "chairperson" for "chairman") and some not ("personhole" for "manhole" or "person person" for "mail man"). Like the replacement of "shepherd" with "sheepherder", few of these have contributed to the euphony of the English language.

If you can avoid using "he" to refer to people in general without contorting your sentences, that is all to the good. Do not forget, though, that as a draftsman your overriding objective is to express an idea as clearly and simply as you can, not to pursue a social ideology, no matter how lofty.

This is especially true with neologisms. Throughout this book I have referred to the "draftsman". I would be pleased to refer instead to the "drafter", except that a drafter is a horse. In a few years from now all new dictionaries may well include "draftsman" among the meanings of "drafter". Then I will use "drafter" instead of "draftsman". Again, let me emphasize that innovation in devising new meanings for words is a flaw, not an asset, in a draftsman. The analogy is to the "creative" clerk who finds hitherto unthought of locations in which to file documents. Certainty of meaning largely depends upon the draftsman's unbendingly conservative use of language.

§5.7. *Choosing between the indicative and the imperative.* Various commentators on drafting have tried, over the years, to persuade draftsmen to use the indicative rather than the imperative mood. For example, "This Act is effective upon the close of 180 days after the date of enactment", is preferred to "This Act shall be effective upon the close of 180 days after the date of enactment". Similarly, "an applicant is entitled to obtain . . ." is better than "An applicant shall be entitled to obtain . . .". Title 5 of the United States Code abounds in illustrations of the technique.

Where the indicative is clear, it should be used. There is always the risk, however, that what is intended as a command will, in the indicative, look merely like a description. Section 101 of title 5, for instance, reads:

> The Executive departments are:
> The Department of State.
> The Department of the Treasury.
> [etc.]

What is the section's purpose? Is it intended to constitute the departments (as would be the case if it read, "The Executive departments shall be . . .") or merely to announce their existence? In this example, either imperative should be used or the provision scratched as unnecessary.

§5.8. *Conferring duties and imposing prohibitions.* The best way to impose a duty on an individual by statute is through the use of a sentence—

- that is in the active voice,
- whose main verb is accomplished by the auxiliary verb "shall", and
- whose subject is that individual.

For example, "An applicant shall file with the Secretary . . ." is better than "There shall be filed with the Secretary . . ." because it shows more clearly who is responsible for doing what must be done.

There are several ways to impose a prohibition. For example:

> "No unauthorized person may use the facility",
> or
> "An unauthorized person shall not use the facility".

Do not say:

> "No unauthorized person shall use the facility",

because this suggests only that you are not *requiring* an unauthorized person to use the facility. The prohibition can nevertheless be read to mean that you are *permitting* him to use it.

Beware of conferring rights as though they were duties. "A member of the commissioned corps of the Public Health Service shall receive transportation . . ." is a poor way of saying, "A member of the commissioned corps of the Public Health Service is entitled to receive transportation . . .". You do not intend, after all, to oblige him to exercise a right to transportation.

§5.9. *The use of "and" and "or".* A common drafting problem is whether to join a coordinate series of words or phrases with "and" or "or". Consider, for example, the following phrase:

(1) Every aged and blind individual . . .

Does this mean:

(2) Every individual who is both aged and blind . . .?

or does it mean:

(3) Every individual who is aged, and every individual who is blind . . .?

In the illustration, the matter can be put beyond doubt by selecting the alternative, either (2) or (3), intended. This is not so easily done in a series such as this:

(4) Every individual who is—
(A) aged,
(B) blind,
(C) otherwise disabled, [and? or?]
(D) indigent,

A well accepted drafting convention is to use "and" if the conditions are to be joint, as in example (2); but to use "or" if the conditions are to be several, as in example (3). Thus, in the absence of a context suggesting the contrary, the meaning of example (1) is that conveyed by example (2).

The use of "or", as dictated by this convention, is also not free of ambiguity. Does the phrase:

(5) Every individual who is aged or blind . . .

mean:

(6) Every individual who is either aged or blind, or both aged and blind . . .?

or does it mean:

(7) Every individual who is aged but not blind, or blind but not aged . . .?*

An equally well accepted drafting convention is to use "or" only in the sense of "either or both", or if there is a series of items, "any one item or combination of items". Thus, the meaning of example (5) is conveyed by example (6).

The conventions, when employed in conjunction with the rule, discussed at §5.5, on drafting in the singular, should get you through most "and/or" problems. For an exhaustive exploration of those problems, see Kirk, *Legal Drafting: the Ambiguity of "And" and "Or"*, *2 Texas Tech Law Rev.* 235-253 (Spring, 1971).

§5.10. *On making statutes readable.* This chapter has touched on what seem to me to be the most salient problems of style and usage that you must confront as a beginning draftsman. I wrote it on the assumption that you already enjoy some feeling for forcible English and are unencumbered by the detritus of outworn legalisms, the aforesaid's and to wit's of a more costive age. My parting recommendation is that you not spend much time, at this stage, on questions of style and usage. It is more important that you gain experience in writing legislation. You are likely to develop an appreciation of these questions only after you have come to grips with them in meeting the challenge of actual drafting.

Legislative drafting is a craft, not an academic pursuit. You will learn it not by reading about it but by imitating good models under expert guidance. The better you get at it, the more your bills will look as though they had been written in English to be read by real people. This is not to say that you should strive for "John and Jane" language. There is a limit to how simply a complex idea can be expressed. That a statute is hard to understand is not always a compelling criticism; what shames the draftsman is a statute that he has made unnecessarily hard to understand. The essence of effective exposition is the expression of complex concepts in simple language. The best drafting expresses its ideas in as easy and natural a way as the subject matter allows.

* More conventionally punctuated, this sentence would read, "Every individual who is aged, but not blind or blind, but not aged . . .". Legislative punctuation will depart from the rules commonly accepted for other forms of writing, however, if the departure promotes clarity.

SPECIFICATIONS, DATED APRIL 18, 1979, SUBMITTED TO THE LEGISLATION DIVISION FOR AN ADMINISTRATION PROPOSAL FOR DOMESTIC VIOLENCE LEGISLATION*

Purpose

Increase participation by States, local communities, non-profit organizations, and individual citizens in efforts to prevent domestic violence and to assist victims and dependents of domestic violence through: State grants and direct grants to local communities for the establishment of domestic violence programs; training and technical assistance to States, public and private non-profit service providers, institutions who train professionals who work with domestic violence victims, and other interested groups, officials and persons; information development, collection, and dissemination; and research, demonstration, and evaluation activities related to domestic violence.

Federal Administration

Authorize the Office of Domestic Violence, established in ACYF, to fund service grants, provide training and technical assistance directly and through grants and contracts, and conduct research, demonstration, and evaluation activities.

Grants for Services

o State grants (65% of total appropriation)

Distributed by formula based on population with a floor of $100,000 per State.

- Of the State allotment not less than 60% would be earmarked for direct service, not more than 15% could be used for State administration.

- State requirements include:

  -- an equitable distribution of grant funds within the State;

  -- a State agency to be designated as responsible for the administration of State program;

  -- confidentiality for both victims and their dependents for the address or location of shelters and other refuges for victims;

  -- active citizen participation within the State both in the development and implementation of a State-wide plan and in the distribution of funds;

* These specifications were prepared by HEW staff and have not been approved within HEW or the Administration.

-- technical assistance to help programs obtain self-sufficiency thru use of local, State, and federal funds not authorized under this Act; and

-- the establishment of linkages between this program and law enforcement agencies and other agencies providing services to domestic violence victims, especially the State title XX agency.

The Secretary may waive any of these requirements if a State can demonstrate that the requirements are detrimental to the establishment of a State-wide program of assistance to victims of domestic violence.

- No matching provision for State grants.

- Funds under this act must be used to supplement rather than supplant existing services provided through State funds or federal funds such as title XX.

o Project grants to communities (20% of total appropriation)

- Project grants would be funded on a competitive basis nation-wide.

- Priority would be given to innovative projects and special target groups such as minorities and rural residents.

- Project would have to demonstrate support from the community through agreements with appropriate agencies such as public welfare, social services, and law enforcement agencies or other such evidence as deemed appropriate by the Secretary.

- Maximum grant level would be $100,000 but no project could receive more than $200,000 over a three year period.

- Grants could not be in excess of 50% of a project's annual budget, exclusive of in-kind and volunteer services. However, a one year waiver would be obtainable for projects in their first year of operation.

- Grants to local public agencies must be approved by the State.

o General Provisions (both State and direct project grants)

- When victims are eligible for services through existing programs such as AFDC, Medicaid, title XX, reimbursement should be obtained from these sources prior to use of funds authorized under this Act. However, there can be no income eligibility for victims or dependents in need of services.

- Confidentiality of victims and their dependents must be assured.

- Projects must be administered and operated by personnel with appropriate skills, and that, where a substantial number of individuals with limited English speaking proficiency would be served, particular attention must be given to the provision of services which respect cultural sensitivities and bridge linguistic and cultural differences.

- No funds may be used as direct payment to any victim or any dependent of a victim of domestic violence.

- Grant funds can not be used for construction, renovation, capital improvements, or purchase of facilities.

Research, Training, Technical Assistance and Other Special Projects

Grants, contracts, and cooperative arrangements with other Federal, State, and public and private non-profit organizations and agencies are authorized for the conduct of research, training, technical assistance and other special projects relating to domestic violence.

Application and Reporting Requirements

o Applications for State grants

- Applications must be made by the chief executive of the State at such time and in such a manner as the Secretary may require.

- Applications must set forth the State plan for meeting the requirements in section ____, performance indicators and how the State will determine if the expected results were achieved, and any other information which the Secretary may require.

- If a State fails to qualify for funds by the sixth month of a fiscal year, the Office on Domestic Violence may use the unallocated funds for the purposes in subsection ___, Grants to Communities, and section ___, Research, Training, Technical Assistance, and Special Projects.

o Applications for project, research, training, technical assistance and other special grants.

No grants may be made under subsection _____, Project Grants to Communities, and section ____, Research, Training, Technical Assistance, and Special Projects, unless an application be made at such time, in such manner and containing such information as the Secretary may require.

o Reporting requirements

- All grant recipients must provide reasonable reports at such time and containing such information as the Secretary may deem essential to carry out the purposes and provisions of this Act and for keeping such records and affording access thereto as the Secretary may deem essential to assure the correctness and verification of such reports.

- In addition to reports required in the above subsection, States shall provide to the Secretary, within 90 days subsequent to the end of the fiscal year, an annual report of activities funded under this Act. This report shall include:

  -- whether the performance indicators established in the grant application were met, and if not, an explanation of the deficiencies;

  -- number, type, and amount of direct services funded under the Act; and

  -- any other information which the Secretary may require.

Evaluation

o One to three percent of the annual appropriation under this Act shall be set aside for purposes of evaluation of activities relating to domestic violence.

o Within three years from the date funds are first appropriated under the Act, an evaluation of activities conducted by the Office on Domestic Violence shall be completed.

This evaluation must address, at a minimum, the following issues:

- The degree to which service funding under the Act, stimulated at the State and in communities the development of special programs and new and additional services to victims of domestic violence and their dependents.

- The extent to which projects funded under the Act, either directly or through States, have achieved or are expected to achieve self-sufficiency through the utilization of other funding sources after funding under this Act is discontinued.

- The extent to which the Office on Domestic Violence has developed and disseminated appropriate and relevant information relating to domestic violence.

- Recommendations on the continuance on the Office on Domestic Violence subsequent to the expiration of authorization to fund services under section ___ of the Act.

The evaluation shall be conducted by persons not directly involved in the operations of the Office on Domestic Violence.

Limitations on the Duration of Activities Funded Under the Act

Section ____, Grants for Services is authorized for a three year period only.

Authorization of Appropriations

$20,000,000 is authorized for fiscal year 1980, $30,000,000 is authorized for each of fiscal years 1981 and 1982. Of the funds appropriated under the Act, 65 percent shall be used to make grants to States, 20 percent shall be used to make grants to private non-profit organizations and local public agenices, and 15 percent shall be used for research, training, technical assistance, other special projects and for the development, collection, and dissemination of information related to domestic violence.

STATE	CASE 1	CASE 2
01 AL	195.8	225.2
02 AK	100.0	111.0
03 AZ	101.7	165.0
04 AR	109.6	170.1
05 CA	1135.0	825.7
06 CO	126.1	180.6
07 CT	172.5	210.3
08 DE	100.0	120.0
09 DC	100.0	127.4
10 FL	388.5	348.4
11 GA	261.3	267.1
12 HI	100.0	128.1
13 ID	100.0	126.0
14 IL	631.3	503.6
15 IN	295.1	288.7
16 IA	160.7	202.7
17 KS	127.6	181.6
18 KY	183.3	217.2
19 LA	207.2	232.5
20 ME	100.0	136.2
21 MD	223.4	242.8
22 MA	323.7	307.0
23 MI	504.3	422.5
24 MN	216.4	238.4
25 MS	125.9	180.5
26 MO	265.9	270.0
27 MT	100.0	125.3
28 NE	100.0	154.0
29 NV	100.0	117.9
30 NH	100.0	126.9
31 NJ	408.0	360.9
32 NM	100.0	137.1
33 NY	1036.3	762.6
34 NC	289.2	284.9
35 ND	100.0	122.5
36 OH	604.9	486.8
37 OK	145.6	193.1
38 OR	119.2	176.2
39 PA	670.1	528.5
40 RI	100.0	134.5
41 SC	147.3	194.2
42 SD	100.0	124.2
43 TN	223.3	242.8
44 TX	637.4	507.6
45 UT	100.0	138.7
46 VT	100.0	116.2
47 VA	264.3	269.0
48 WA	193.6	223.8
49 WV	100.0	163.5
50 WI	251.2	260.6
51 WY	100.0	112.1
52 GM	100.0	103.1
53 MR	100.0	103.4
54 PR	154.2	198.6
55 VI	100.0	102.4
TOTAL	13000.0	13000.0

CASE 1: REACH FLOOR BY PRO-RATA
REDUCTION OF STATES ABOVE FLOOR.
CASE 2: GIVE ALL STATE FLOOR, TH
DISTRIBUTE REMAINDER.

Administration Proposal for
Domestic Violence Legislation

Questions on draft specifications dated April 18, 1979

Federal Administration

1. Why should the bill vest statutory authority in a non-statutory Office on Domestic Violence in the Administation for Children, Youth and Families? Shouldn't, instead, a delegable authority be vested in the Secretary?

Grants for Services: State Grants

2. The specifications call for a formula based on population with a floor of $100,000 per state. Does this floor also apply to the territories?

3. How is population to be determined? Most recent data available to the Secretary? Decennial census? Some other basis?

4. How is the $100,000 floor established? That is, should $100,000 first be allotted to each state and then the remainder be allotted on the basis of population, or should there first be an allotment of the appropriated amount and then each state that would receive less than $100,000 be brought up to $100,000? If the latter, what is the formula for reducing the states that are above $100,000?

5. The specifications are silent on whether the formula is to allot an appropriation (which we assume to be intended) or allot the authorization (which would create an entitlement in each state, i.e., a claim against the United States enforceable in court should the appropriation be insufficient to "liquidate" the allotment of any state). What is intended?

6. The specifications would require a state to use at least 60 percent of its formula grant for "direct service". What is meant by this term? Does it include state vendor payments? Does it include cash payments to a beneficiary for use in obtaining a service? Is the provision of housing a service?

7. What sanction should be provided if a state uses less than 60 percent of its formula grant for direct service?

8. If a state uses 60 percent of its grant for a direct service, and 15 percent for administration, what could the remaining 25 percent be used for?

9. Does the provision of technical assistance by state employees constitute an administrative expense to which the 15 percent

limitation applies? What if technical assistance is provided by a contract with a private organization?

10. What sanction should be provided if a state uses more than 15 percent of its formula grant for administrative expenses?

11. The specifications require the state to provide "an equitable distribution of grant funds within the State". Is this requirement merely precatory? If not, how will the Department be able to tell if a distribution is equitable? Should the bill provide for the Secretary to define "equitable" in regulations? Should the bill include requirements for the state to display some of the more obvious indicia of equitability, such as a requirement that the program be in effect in every political subdivision of the state?

12. Is the state allowed to use its allotment for demonstration programs? If so, how does the "equitable distribution" requirement apply to these?

13. Does the equitability requirement bar the state from establishing categories of individuals who will be eligible? Are there limits to the criteria that may be employed for this purpose? (For example, according to a later specification there can be no income test for eligibility. But could the state give preference to categories of victims based on income?)

14. What is the sanction for violation of the equitability rerequirement?

15. The specifications require the state to provide for "confidentiality for both victims and their dependents for the address or location of shelters and other refuges for victims". Is this information also to be concealed from state and federal officials when required for official purposes? For example, what if an individual is an SSI recipient and the inquiry is made by the Social Security Administration?

16. If a community has only one shelter, the whereabouts of a victim could be easily ascertained. Do the specifications intend that the location of shelters be concealed? What if the shelter is a public building?

17. In view of the confidentiality requirement, should the state be required to assume responsibility for acting as a go-between for the husband and his battered bride? What if they wish to serve legal papers on each other? What if the husband has a judgment that he wishes to execute against his wife?

18. The specifications require the state to provide for "active citizen participation within the State both in the development and implementation of a State-wide plan and in the distribution of funds." Should the bill require the state to establish any public procedures to assure this, as under title XX of the Social Security Act?

19. How will the Secretary or a state distinguish between "active" citizen participation, and just plain old citizen participation?

20. What if the consequence of citizen participation is a a plan that does not meet the "equitable distribution" requirement? In other words, are the two requirements different ways of getting at the same thing; and, if so, can one be dropped?

21. What is meant by citizen participation in "implementation" of the plan and "in the distribution of funds"? Does this mean voluntary activity? How can private citizens be asked to implement a state program or distribute money? What if they decline the opportunity?

22. Is there a sanction for insufficient citizen participation?

23. What are the kinds of programs to which the technical assistance requirement will apply? What kind of technical assistance would help make such a program self-sufficient?

24. What does it mean to establish "linkages" to other agencies and programs? Presumably, one such linkage would be for the program to report all incidents of domestic violence to the police. How does this square with the confidentiality requirement?

25. What meaning should be given to the specification that "linkages" should be established "especially" with the state title XX agency? Does the word "especially" require that these linkages be given some different treatment in the bill than other required linkages?

26. The specifications call for a "supplement rather than supplant" provision. These provisions are inherently unenforceable because the federal government has no way of telling how much a state would have spent on a given activity had federal funds not been available for it. Does this make any difference?

27. Is there to be any limitation on what the state is permitted to call a program to prevent domestic violence? For example, could the state pay part of the cost of its criminal justice system on the theory that it operates to incarcerate men who assault their wives? Could the state use the federal allotment to pay for the support of its prisons? for a special prosecutor specializing in domestic violence prosecutions?

Grants for Services: Project Grants to Communities

28. What is meant by the specification requiring that priority be given to innovative projects and special target groups? Does this mean that the Secretary may not make a project grant to a community for any purpose unless all applications for innovative projects and special target groups have been funded? If it means something less, what?

29. The specifications speak of "special target groups such as minorities and rural residents." What are the other "special target groups"? Do minority groups include ethnic minorities?

30. If the minority group is one having a traditionally low incidence of domestic violence (such as chinese-americans, perhaps?) why should grants to communities proposing projects for such groups be given priority?

31. The requirement that a project "would have to demonstrate support from the community" is followed by illustrations that seem more related to a requirement that the project be coordinated with other community efforts to assure that the project is successful. If this is the objective, should anything beyond this be required?

32. A specification at a later point limits a grant for services to three years. If this limit applies to individual projects, then the specification that no project may receive more than $200,000 over a three-year period is clear. If it does not apply, then the question is whether the $200,000 limitation over a three-year period implies a rolling or a fixed base period. In other words, If a project receives $100,000 each for year one, year three, and year four, may it receive $100,000 in year five (on the assumption that the year three award is associated with the three-year period consisting of years one, two, and three, and that the project will be ineligible for an award for year six)?

33. Does the reference in the specification to "over a three year period" mean to limit the awards <u>in</u> a year or <u>for</u> a year?

34. Is the three-year limit on such awards to apply to fiscal years or calendar years?

35. A specification calls for the project grant to be not in excess of 50 percent of a project's annual budget. Does this mean that the grant may be no more than one-half of the amount expended for the project, or does it mean that the grant may be no more than one-third of the amount expended?

36. What if the portion of the non-project-grant amount available for a project consists in part of federal funds from, say, title XX of the Social Security Act? Should this portion be excluded from the computation of that amount when determining the 50 percent limitation?

37. Are project grants available to private organizations? Are they available to profit-making organizations?

Grants for Services: General Provisions

38. A specification for a general provision prohibits taking income of a victim into account in determining eligibility of individuals "in need of services." If an individual has substantial resources, however, the individual can provide for his own services. Does the specification, therefore, intend to allow a victim's assets (other than income) to be taken into account?

39. The specifications call for reimbursement for services from existing programs. Is the state permitted to institute regulations under title XX that would give a low priority under that title for assistance to individuals eligible under the domestic violence initiative?

40. What does it mean to say that AFDC shall reimburse services provided under the domestic violence initiative, inasmuch as AFDC is not a service program?

41. Does the requirement, "Confidentiality of victims and their dependents must be assured", duplicate a portion of the requirement under the "grants for services" specifications to the same effect? May we dispense with the earlier requirement, or else add a similar requirement to the project grants and dispense with the general provision?

42. What does it mean to require that a domestic violence project grant or a state service grant be provided "which respect cultural sensitivities"? Is there some particular bureaucratic conduct that the specifications seek to prohibit (or encourage)?

43. Why does the requirement about "cultural sensitivities" (whatever it may mean) apply only to people with "limited English speaking proficiency"? What about minority or ethnic groups that speak adequate English?

44. What does it mean to require that "particular attention" be given to the provision of services? How will we be able to tell if this requirement is being observed?

45. Under the specification prohibiting the use of grant funds for renovation, does this also prohibit minor remodeling? For example, if a project is established to provide shelter, can grant funds be used to break through a partition in order to create a lounge? or to paint the walls? or to improve the lighting? or other work intended to convert, say, a former private home into a house suitable for temporary group living?

46. May grant funds be used for the purchase of furniture? appliances?

47. May grant funds be used to purchase a building or land? If not, may they be used to lease a building? land? If so, may they be used to purchase a lease that runs beyond the year in which the funds are granted?

Research, Training, Technical Assistance and Other Special Projects

48. A specification calls for authorizing the Secretary (or ODV) to make grants to, or contracts with, other federal agencies for "research, training, technical assistance and other special projects relating to domestic violence." In view of the Economy Act (31 U.S.C. 686) why is this provision needed? Also, if it is desirable for another federal agency to do research into domestic violence, should not the appropriations for that activity appear in that agency's budget rather than in HEW's?

49. What is meant by the specification to authorize "cooperative arrangements"? The Federal Grant and Cooperative Agreement Act of 1977, P.L. 95-224, defines "cooperative agreement". Is a cooperative arrangement the same as a cooperative agreement?

50. If amounts may be provided to other Federal agencies, is it desirable to provide that these amounts be credited to the appropriation of the agency? credited to miscellaneous receipts of the Treasury? If the amounts are to be credited to the appropriations of the other agency, need there be language to assure that the amounts remain available for the use of the agency until expended?

51. Are the special projects that are to be authorized under the "Research, Training, Technical Assistance and Other Special Projects" portion of the specifications to be subject to any of the conditions or limitations (privacy, reimbursement, direct payment, construction) to which service grants are subject?

52. How do the research, etc., grants differ, in purpose, from the project grants to communities?

Application and Reporting Requirements: Applications for State Grants

53. The application for a state grant, according to the specifications, must set forth "performance indicators and how the State will determine if the expected results were [achieved]". What is meant by "performance indicators"? examples? Does the term "expected results" mean the results expected from the performance indicators or the results expected from the plan? If the latter, does not the reference to "performance indicators" duplicate the requirement that the state explain how it will determine if the expected results were achieved?

54. A specification is, "If a State fails to qualify for funds by the sixth month of a fiscal year, the Office on Domestic Violence may use the unallocated funds" for the community project grants or the research, etc., grants.

(a) Does "by the sixth month" mean the period that ends with the close of the preceding month, or the period that ends with the close of the sixth month?

(b) Does "qualify" mean, "fail to submit an approvable application"? or does it mean, "fail to have an application approved"? If it means the latter, what about the case in which the state has submitted an approvable application, but the Department has failed to act on a timely basis?

(c) If a state should "qualify" for funds as provided, but fail to expend them, should the funds be reallotted among the remaining states (with extended availability)? Should those funds be available for use in the same way as funds that had been reserved for states that failed to qualify? Should they be allowed to lapse?

(d) Why is authority vested in the Office on Domestic Violence rather than in the Secretary?

Application and Reporting Requirements: Applications for project, research, training, technical assistance and other special grants

55. Why do the general provisions that were previously applied to the community project grants not apply to the research, etc., grants?

Application and Reporting Requirements: Reporting requirements

56. What does it mean to require a grant recipient to provide "reasonable reports . . . containing such information as the Secretary may deem essential . . ."? Who is to determine if the report is "reasonable" (i.e., reasonable to require)? May a grantee refuse to provide a report that it considers unreasonable if the Secretary deems the information sought to be essential?

57. Is there a difference between information that the Secretary may "deem essential" and information that the Secretary considers necessary? May the Secretary "deem" information to be "essential" if he finds the information to be necessary?

Evaluation

58. A specification calls for setting aside "one to three per cent" of the annual appropriation for evaluation. Who is to decide on the exact percentage?

59. Does the evaluation set-aside mean that the Secretary may take up to 3 percent of the appropriation before allocation? If so, is the specification under "Authorization of Approprations" correct in requiring the percentages for the grant programs to be calculated on the basis of the funds appropriated? On the other hand, if the 3 percent is taken after allocation, are there any rules on how much (or what proportion of the 3 percent) may be taken from any one of the three grant programs?

60. Although the amount to be set aside for evaluation appears to be set aside annually, the specifications seem only to call for a one-time evaluation. By the time this evaluation is required to be completed -- three years from the date of the first appropriation -- there could be as much as $2.4 million available for it. Is this intended? If not, what is to be done with the rest of the money? Is there any evaluation after the first one? annually? every three years?

61. What is meant by an evaluation of activities "conducted" by the Office on Domestic Violence? Does the phrase preclude an evaluation of activities conducted by the program's grantees?

62. None of the matters that must be evaluated relates to the effectiveness of the program of a grantee, except its effectiveness in stimulating new and additional services, or programs. Is evaluation of the effectiveness of services provided under the assisted program a secondary consideration?

63. Similarly, why is the only matter that must be evaluated with respect to the Office on Domestic Violence the matter of its development and dissemination of information? Nothing in the specifications suggests that this is a significant function for that Office.

64. What is to be done with the evaluation when it is completed. Should it be reported to the Secretary? the President? the Congress?

Limitations on the Duration of Activities Funded Under the Act

65. The specification on limitation of funding merely says, "Grants for services [are] authorized for a three year period only". Presumably, this is more than a mere restatement of the section authorizing appropriations for fiscal years 1980, 1981, and 1982. Does it mean to limit grants to states? state grants to grantees? project grants to communities? receipt by the grantee or contractor of amounts from a project grant to a community?

66. Does the limitation on duration apply to special projects under the research, etc., section, if the special projects involve the provision of services?

Authorization of Appropriations

67. The specification for an appropriations authorization calls for certain fixed percentages of appropriated funds to "be used" for the various programs (i.e., to be made available only for use for those programs). Nevertheless, a specification dealing with the state grants provides that if a state fails to qualify for funds, the amount set aside for it may be used for the remaining two grant programs. Should there be a reciprocal provision to handle the contingency of a surplus of funds in either of those other two programs?

General questions

68. What is domestic violence? Is it anything that a participating state chooses to call it? should it be defined in the bill? should the definition be left to the Secretary's regulations?

69. Are there forms of violence that should be excluded from the bill? Does domestic violence include child abuse? injury done to a live-in mother-in-law by her daughter-in-law? injury done by a husband to his wife outside of the home? injury done by a man to his mother-in-law in the mother-in-law's home (in which the man does not live)? injury done by a teenage child to a parent? injury done by an adult to his brother, with whom he is living? injury done by a man to his wife if they are separated under court order? divorced? threats causing psychological injury but not involving physical abuse?

Administration Proposal for Domestic Violence Legislation

Answers to questions on draft specifications

1. Vest all authority in the Secretary.

2. Include the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and the Northern Marianas.

3. For population, use the most recent data available to the Secretary under his regulations.

4. Allocate $100,000 to all jurisdictions first, then allocate the balance by population. Put in a provision to the effect that if the appropriation is insufficient to provide for $100,000 to each jurisdiction, then each jurisdiction is to receive an amount equal to the quotient that results from dividing the appropriation by the number of participating jurisdictions.

5. Allot the appropriation, not the authorization.

6-7. Disregard the specifications requiring a state to use at least 60 percent of its formula grant for direct service.

8-10. Disregard the specification requiring a state to use no more than 15 percent of its formula grant for administration.

11-14. Disregard the specification requiring equitable distribution of grant funds.

15-17. The state plan should contain an assurance that the state will institute procedures to assure the confidentiality of beneficiaries, to the extent feasible, insofar as needed for their physical protection.

18-21. Title XX procedures are not to be used to assure citizen participation. The state should provide assurances in its state plan that it will consult with individuals who have been victims, or representatives of victims, of domestic violence in developing programs under the plan; and, as appropriate, that the programs should provide an opportunity for participation of unpaid volunteers.

22. The sanction for a state's failure to comply with its plan is the termination of the program after notice and opportunity for hearing.

23. The main intention is that the state provide information on other sources of public funding in order to push programs on to that funding.

24-25. The state should provide a means for informing victims of the availability of public services of which the victim may be in need, should establish administrative arrangements for coordinating the provision of those services, and should review the requirements of various state programs with a view toward facilitating their provision to victims of domestic violence.

26. Notwithstanding its unenforceability, use the "supplement rather than supplant" language.

27. The main thrust of the state service grant program should be the provision, for no more than 30 consecutive days, of emergency housing, protection, and related services to a victim of domestic violence. Services should include counseling of the victim and the aggressor, emergency medical treatment for traumatic injuries, shelter for children where the injured spouse takes the children with him, and counseling of children as part of services to victim. See, also, the answers to questions 68 and 69.

28-30. Disregard priority for special target groups. Instead, restructure the "Project Grants to Communities" portion of the bill as a research and development program for innovative projects.

31. Disregard specification for showing of community support.

32-34. Disregard specification for limitation on amount and duration of grant.

35. Change the matching requirement to 80-20 cash match, with waiver of some or all of match for good cause. For this purpose, the contribution of land or a building will be treated as cash at market value.

36. Any money qualifies as matching money, provided that it has not been used for a required match for some other federal program.

37. Grants for nonprofit, no grants for profit-making, organizations. Contracts with any public or private entity.

38. An individual's assets are not to be taken into account in determining his eligibility.

39-40. Disregard specification for reimbursement from existing programs.

41. The draftsman may organize the confidentiality requirements as he sees fit.

42-44. Disregard specification regarding cultural sensitivities.

45. Permit funds to be used for renovation.

46. Grant funds may be used for the purchase of personalty.

47. Grant funds may be used for the purchase of a lease not exceeding one year in duration. Otherwise, they may not be used to purchase realty.

48. Put in provision patterned after section 307 of the Public Health Service Act.

49. Use the term "grant", but define to include "cooperative agreement".

50. Agencies that receive grants should be empowered to use them to augment the relevant appropriation.

51-52. Fold the RTTA program into what was the Project Grants to Communities program, so that there is a single R & D program.

53. "Performance indicators" means that the state must explain in detail in its submissions under the state plan exactly what it proposes to do. The state is also subject to the usual federal audit requirements. Finally, the state should design some means by which it will be possible to tell whether it did what it proposed to do, and for evaluating the worth of what it did.

54. A state must submit an approvable application by the end of the eighth month of a fiscal year, with no reallotment of unused funds. All authority to be vested in the Secretary, as per answer to question 1.

55. Because the project grant programs are now merged, a single set of general provisions will apply to grants under the merged program.

56. Eliminate reference to "reasonable" in the requirement for grantees to submit reports.

57. The information required must be necessary, but need not be "essential".

58-59. The Secretary takes for evaluation at least one percent, but not in excess of three percent, of the total appropriation before it is allocated. He then allocates the full $100,000 per jurisdiction, and finally the balance.

60. The Department should annually evaluate itself and its grantees under the program. In addition, there should be one study of the worth of the entire enterprise. This latter should cover substantially all experience under the new Act from its enactment to its expiration date.

61. There should be an evaluation of activities of federal grantees under the Act.

62-63. There should also be an evaluation of the effectiveness of services provided under the assisted program.

64. Report should be made to the President and the Congress.

65. The intention was to write a sunset provision.

66. The sunset provision applies to everything.

67. Amounts not used for the R & D program should be allowed to lapse.

68-69. Try a definition of domestic violence as injury done by an individual to his spouse, or done by an individual to one with whom he is (or was) living as man and wife (whether or not the relationship is so recognized under state law).

Additional specifications

I. Add requirement to state grant program for a 75-25 percent match (the state to put up the 25 percent).

II. Drop specification for funding project grants on a competitive basis nationwide.

III. Applications for grants to local public agencies must be approved by the state (rather than requiring the state to approve the grant).

IV. The state plan should set forth all other services and benefits related to domestic violence that the state provides.

V. Change specifications for division of appropriation so that 75 percent is applied to state grant program and 25 percent to the R & D project grant program. The 3 percent for evaluation is deducted before making this 75/25 split.

OUTLINE OF THE SECTIONS OF A SAMPLE STATUTE

Here is a summary of the subject matter of each of the sections of the Egg Products Inspection Act, Public Law 91-597, 84 Stat. 1620 et seq., 21 U.S.C. 1031 et seq.:

(1) The Act begins with a short title, the "Egg Products Inspection Act".

(2) Section 2 of the Act consists of legislative findings on the importance of eggs and egg products, and an announcement that commerce in them is or affects interstate commerce.

(3) Section 3 states the Congress' purpose in enacting the Act.

(4) Section 4 defines certain of the Act's terms.

(5) Section 5, the first of the Act's operative provisions, prescribes its scope: to whom and what the Act applies. Specifically, the section directs the Secretary of Agriculture to cause continuous inspection of egg processing plants, and to condemn egg products unfit for human consumption.

(6) Section 6 requires plants subject to inspection to operate in accordance with sanitary standards established by the Secretary of Agriculture.

(7) Section 7 deals with the treatment, packaging, and labeling of inspected eggs and egg products.

(8) Section 8 specifies prohibited acts.

(9) Section 9 authorizes the Secretary to cooperate with appropriate governmental agencies in carrying out the Act.

(10) Section 10 excludes from inspection plants processing egg products not for human food, and prescribes means to prevent those products from being used for human food.

(11) Section 11 authorizes the Secretaries of Agriculture and HEW to require reports, from persons in the egg trade, dealing with the sale and disposition of egg products, and to inspect and copy those persons' business records.

(12) Section 12 prescribes penalties for those who commit prohibited acts and other offenses related to the Act's enforcement.

(13) Section 13 requires the pertinent Secretary to give notice and opportunity for hearing to any person against whom criminal proceedings are contemplated because of a violation of the Act.

(14) Section 14 authorizes the Secretary of Agriculture to prescribe regulations for the Act's enforcement.

(15) Section 15 authorizes the Secretary of Agriculture to issue regulations that exempt from the Act enumerated categories of activity (e.g., sale by a poultry producer of eggs from his own flocks directly to private households for consumption).

(16) Section 16 authorizes the Secretary of Agriculture to limit the entry of eggs, egg products, and other materials, into inspected plans to assure consistency with the Act's purposes.

(17) Section 17 governs the importation of eggs.

(18) Section 18 allows the Secretary of Agriculture, in very specific circumstances, to refuse to provide a plant with inspection services (thereby making its eggs unmarketable).

(19) Section 19 authorizes the administrative detention of products violating the Act.

(20) Section 20 authorizes judicial seizure and condemnation of violative products.

(21) Section 21 confers jurisdiction on district courts to enforce the Act.

(22) Section 22 vests in the Secretary of Agriculture certain general administrative authorities to enforce the Act.

(23) Section 23 governs the Act's relationship with similar state legislation and with the Federal Food, Drug, and Cosmetic Act.

(24) Section 24 provides for inspected plants to pay for the costs of inspection, when performed on overtime or holidays.

(25) Section 25 amends the Small Business Act to permit loans for persons who need them to come into compliance with the Egg Act.

(26) Section 26 requires the Secretary of Agriculture to submit an annual report to the Congress.

(27) Section 27 authorizes the appropriation of sums necessary to carry out the Act.

(28) Section 28 is a separability provision.

(29) Section 29 establishes the Act's effective dates.

TENTATIVE ASSIGNMENT OF DOMESTIC VIOLENCE SPECIFICATIONS TO DESIGNATED (UNORDERED) SECTIONS

(Item numbers are those noted in the margin of the attached mark-up of Appendix A)

Short Title

Note: Although the specifications do not provide for a short title, a bill of this length is customarily given one.

Findings and Purpose

Item 1.

Note: Findings and statements of purpose may be useful to support the constitutionality of bills founded upon the commerce clause. In bills such as the domestic violence proposal, which use the authority of the welfare clause, they are included primarily because policy makers think they have some value in commending the proposal to Congress and the public.

Authorization of Appropriations

Items 23 and 27.

Evaluations and Reports

Items 24, 25.

Definitions

Note: At a minimum, you probably will find it convenient to put in one place definitions of the terms, "State", "Secretary", "domestic violence", and "construction".

State Grants for Services

Items 2, 9, 19, 21, 22.

State Plan Requirements

Items 3, 4, 5, 6, 7, 8, 10, 17, 18.

Research and Demonstration Projects

Items 11, 12, 15.

Application for Project Grant

Items 13, 14, 20, 21, 22.

Sunset Provision

Item 26.

Note: You may wonder what a three-year sunset section will accomplish that the expiration of the authorization in three years will not. One danger in the section is that it sets a trap for the unwary draftsman of a future resolution continuing appropriations. Unless special provision is made in that resolution, it will fail to extend a program containing sunset language. The sunset section therefore creates the risk that in October of 1982, if the reauthorization bill has not been acted on, the continuing resolution, through the inadvertance of its draftsman, may fail to preserve the program, which would then terminate, in effect, by accident.

Administration

Note: Let us put this in, tentatively, for general administrative provisions, such as advance payment of grant, although it is not yet clear if we will need it. You may also want to put here a provision to authorize a cooperative agreement as an alternative to a grant, per Q and A No. 49.

SPECIFICATIONS, DATED APRIL 18, 1979, SUBMITTED TO THE LEGISLATION DIVISION FOR AN ADMINISTRATION PROPOSAL FOR DOMESTIC VIOLENCE LEGISLATION

Purpose

Increase participation by States, local communities, non-profit organizations, and individual citizens in efforts to prevent domestic violence and to assist victims and dependents of domestic violence through: State grants and direct grants to local communities for the establishment of domestic violence programs; training and technical assistance to States, public and private non-profit service providers, institutions who train professionals who work with domestic violence victims, and other interested groups, officials and persons; information development, collection, and dissemination; and research, demonstration, and evaluation activities related to domestic violence.

Federal Administration

Authorize the Office of Domestic Violence, established in ACYF, to fund service grants, provide training and technical assistance directly and through grants and contracts, and conduct research, demonstration, and evaluation activities.

Grants for Services

- State grants ([65%] 75% of total appropriation)
  - Distributed by formula based on population with a floor of $100,000 per State.
  - Of the State allotment not less than 60% would be earmarked for direct service, not more than 15% could be used for State administration.
  - State requirements include:
    - -- an equitable distribution of grant funds within the State;
    - -- a State agency to be designated as responsible for the administration of State program;
    - -- confidentiality for both victims and their dependents for the address or location of shelters and other refuges for victims;
    - -- active citizen participation within the State both in the development and implementation of a State-wide plan and in the distribution of funds;

6 -- technical assistance to help programs obtain self-sufficiency thru use of local, State, and federal funds not authorized under this Act; and

7 -- the establishment of linkages between this program and law enforcement agencies and other agencies providing services to domestic violence victims, especially the State title XX agency.

8 The Secretary may waive any of these requirements if a State can demonstrate that the requirements are detrimental to the establishment of a State-wide program of assistance to victims of domestic violence.

9 - [No] 75-25 matching provision for State grants.

10 - Funds under this act must be used to supplement rather than supplant existing services provided through State funds or federal funds such as title XX.

o [Project grants to communities] (20% of total appropriation) now an R+D authority (25%

No - Project grants would be funded on a competitive basis nation-wide.

11 - Priority would be given to innovative projects [and special target groups such as minorities and rural residents].

No - Project would have to demonstrate support from the community through agreements with appropriate agencies such as public welfare, social services, and law enforcement agencies or other such evidence as deemed appropriate by the Secretary.

No - Maximum grant level would be $100,000 but no project could receive more than $200,000 over a three year period.

12 - Grants could not be in excess of 50% of a project's annual budget, exclusive of in-kind and volunteer services. However, a one year waiver would be obtainable for projects in their first year of operation.

13 - Grants to local public agencies must be approved by the State.

o General Provisions (both State and direct project grants)

- When victims are eligible for services through existing programs such as AFDC, Medicaid, title XX, reimbursement should be obtained from these sources prior to use of funds authorized under this Act. However, there can be no income eligibility for victims or dependents in need of services.

- Confidentiality of victims and their dependents must be assured.

- Projects must be administered and operated by personnel with appropriate skills, and that, where a substantial number of individuals with limited English speaking proficiency would be served, particular attention must be given to the provision of services which respect to cultural sensitivities and bridge linguistic and cultural differences.

- No funds may be used as direct payment to any victim or any dependent of a victim of domestic violence.

- Grant funds can not be used for construction, renovation, capital improvements, or purchase of facilities.

Research, Training, Technical Assistance and Other Special Projects

Grants, contracts, and cooperative arrangements with other Federal, State, and public and private non-profit organizations and agencies are authorized for the conduct of research, training, technical assistance and other special projects relating to domestic violence.

Application and Reporting Requirements

o Applications for State grants

- Applications must be made by the chief executive of the State at such time and in such a manner as the Secretary may require.

- Applications must set forth the State plan for meeting the requirements in section ____, performance indicators and how the State will determine if the expected results were achieved, and any other information which the Secretary may require.

19

- If a State fails to qualify for funds by the sixth month of a fiscal year, the Office on Domestic Violence may use the unallocated funds for the purposes in subsection ___, Grants to Communities, and section ___, Research, Training, Technical Assistance, and Special Projects.

o Applications for project, research, training, technical assistance and other special grants.

20

No grants may be made under subsection _____, Project Grants to Communities, and section ____, Research, Training, Technical Assistance, and Special Projects, unless an application be made at such time, in such manner and containing such information as the Secretary may require.

o Reporting requirements

21

- All grant recipients must provide reasonable reports at such time and containing such information as the Secretary may deem essential to carry out the purposes and provisions of this Act and for keeping such records and affording access thereto as the Secretary may deem essential to assure the correctness and verification of such reports.

22

- In addition to reports required in the above subsection, States shall provide to the Secretary, within 90 days subsequent to the end of the fiscal year, an annual report of activities funded under this Act. This report shall include:

  -- whether the performance indicators established in the grant application were met, and if not, an explanation of the deficiencies;

  -- number, type, and amount of direct services funded under the Act; and

  -- any other information which the Secretary may require.

Evaluation

23

o One to three percent of the annual appropriation under this Act shall be set aside for purposes of evaluation of activities relating to domestic violence.

o Within three years from the date funds are first appropriated under the Act, an evaluation of activities 24 conducted by the Office on Domestic Violence shall be completed.

This evaluation must address, at a minimum, the following issues:

- The degree to which service funding under the Act, stimulated at the State and in communities the development of special programs and new and additional services to victims of domestic violence and their dependents.

- The extent to which projects funded under the Act, either directly or through States, have achieved or are expected to achieve self-sufficiency through the utilization of other funding sources after funding under this Act is discontinued.

- The extent to which the Office on Domestic Violence has developed and disseminated appropriate and relevant information relating to domestic violence.

- Recommendations on the continuance on the Office on Domestic Violence subsequent to the expiration of authorization to fund services under section ___ of the Act.

25 The evaluation shall be conducted by persons not directly involved in the operations of the Office on Domestic Violence.

Limitations on the Duration of Activities Funded Under the Act

26 Section ____, Grants for Services is authorized for a three year period only.

Authorization of Appropriations

27 $20,000,000 is authorized for fiscal year 1980, $30,000,000 is authorized for each of fiscal years 1981 and 1982. Of the funds appropriated under the Act, 65 percent shall be used to make grants to States, 20 percent shall be used to make grants to private non-profit organizations and local public agenices, and 15 percent shall be used for research, training, technical assistance, other special projects and for the development, collection, and dissemination of information related to domestic violence. See revised 4/pages.

A SUGGESTED SEQUENCE FOR THE SECTIONS OF THE DOMESTIC VIOLENCE BILL

Section 1. Short Title

Sec. 2. Findings and Statement of Purpose

Sec. 3. Definitions

Sec. 4. Authorization of Appropriations

Sec. 5. State Grants for Services

Sec. 6. State Plan Requirements

Sec. 7. Research and Demonstration Projects

Sec. 8. Application for Project Grant or Contract

Sec. 9. Administration

Sec. 10. Evaluations and Reports

Sec. 11. Sunset Provision

A B I L L

To protect the public health by providing flexibility in the regulatory process to prevent the occurrence of botulism if prohibition of nitrites and nitrates becomes necessary and would be warranted by studies of their carcinogencity or other toxic effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Nitrite Moratorium and Food Safety Act".

Definitions

Sec. 2. As used in this Act, the term--

(1) "food" (except as used in the term "meat food product") has the same meaning as is assigned to that term by section 201(f) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 321(f);

(2) "meat food product" has the same meaning as is assigned to that term by section 601(j) of the Federal Meat Inspection Act, 21 U.S.C. 601(j);

(3) "poultry product" has the same meaning as is assigned to that term by section 453(f) of the Poultry Products Inspection Act, 21 U.S.C. 453(f);

(4) "commerce" means the introduction or delivery for introduction of a meat food product, poultry product, or other article of food into interstate

commerce, its receipt in interstate commerce, or its manufacture for such introduction, delivery for introduction, or receipt;

(5) "interstate commerce" means, with respect to a meat food product, poultry product, or other article of food, any commerce (including intrastate, interstate, and foreign commerce) as may be subject to regulation under the Federal Meat Inspection Act, the Poultry Products Inspection Act, or the Federal Food, Drug, and Cosmetic Act, respectively; and

(6) "nitrite" means sodium or potassium nitrite or nitrate.

Moratorium on Prohibition of Nitrite in Food to Prevent Botulism

Sec. 3. (a) Neither the Secretary of Health, Education, and Welfare nor the Secretary of Agriculture may prohibit commerce, prior to May 1, 1980, in any food by reason of the carcinogenic or other toxic effect of the nitrite added to that food, if--

(1) nitrite was permitted to be added to that food on May 1, 1979, under the applicable Act cited in paragraph (1), (2), or (3) of section 2, and

(2) the quantity of nitrite added to that food is within the tolerances in effect on May 1, 1979, for that food under such applicable Act for the purpose

of preventing botulism, or within such tolerances for that food as may thereafter be established under such applicable Act, for the purpose of preventing botulism, as provided by subsection (b).

(b) The preceding subsection does not proscribe the establishment, under such applicable Act, of tolerances, for the addition of nitrite to any food, that are lower than the tolerances for such addition that are in effect on May 1, 1979, if those lower tolerances have been proposed for that food by a notice of a proposed rule published in the Federal Register after calendar year 1977 but prior to May 1, 1979.

Action Authorized On or After May 1, 1980

Sec. 4. (a) Except as provided by subsection (b), neither the Secretary of Agriculture (with respect to any meat food product or poultry product) nor the Secretary of Health, Education, and Welfare (with respect to any other food) may, by reason of the addition to that food of a quantity of nitrite, prohibit commerce, on or after May 1, 1980, in any food to which section 3 applies, if the appropriate Secretary finds, after opportunity for hearing to be held in compliance with 5 U.S.C. 553 at any time following the enactment of this Act, that the addition of that quantity of nitrite in that food (1) is shown to be safe, or (2) if not shown to be safe, is shown to be necessary

to protect against the development in that food of the Clostridium botulinum toxin.

(b)(1) If, under the preceding subsection, the addition of that quantity of nitrite in a food is not shown to be safe, but is shown to be necessary within the meaning of clause (2) of that subsection, the appropriate Secretary, by regulation promulgated under the preceding subsection, shall permit the addition of nitrite to that food only for the period of time the Secretary determines to be necessary for there to become available a means not requiring the addition of nitrite, or requiring the addition of a lesser quantity of nitrite, to prevent the development in that food of Clostridium botulinum toxin. Such means shall (A) be feasible and (B) afford a degree of protection against such development that is determined by the Secretary to be at least substantially equivalent to that afforded by the addition of nitrite to that food in the quantity shown to be necessary under subsection (a)(2).

(2) A food is deemed adulterated within the meaning of the applicable Act cited in paragraph (1), (2), or (3) of section 2 if nitrite is added to that food after the period of time prescribed with respect to that food under paragraph (1) of this subsection, except in such quantity

(if any) and under such conditions of processing, storage, shipment, or other handling of that food as the Secretary may, by regulation under subsection (a), prescribe.

(3) For the purpose of establishing the period of time to be prescribed under paragraph (1), each Secretary shall consider, with respect to the food to which that period of time is applicable --

(A) the likelihood that the Clostridium botulinum toxin will develop in that food if nitrite is not added, or added in a reduced quantity;

(B) the extent and magnitude of the risk to the public health should that toxin so develop;

(C) the extent and magnitude of the risk to the public health from the addition of nitrite to that food;

(D) the effectiveness and feasibility of means for preventing botulism, other than the addition of nitrite to that food at then current levels, and

(E) such additional matters as he determines to be relevant.

Review and Amendment of Regulations

Sec. 5. The Secretary of Health, Education, and Welfare and the Secretary of Agriculture shall each review annually the regulations he has issued under this Act in order to determine progress toward making available effective and

feasible alternative means for preventing botulism. Each Secretary may, after opportunity for hearing in compliance with 5 U.S.C. 553, amend (consistent with the requirements of this Act) any regulation he has promulgated under this Act, if he determines an amendment is necessary to protect the public health.

Continued Applicability of Other Acts

Sec. 6. The Acts cited in paragraphs (1), (2), and (3) of section 2 continue to apply to food to which this Act is applicable, except as modified by the provisions of this Act. No State, territory, or possession of the United States (including the Commonwealth of Puerto Rico), or the District of Columbia, may take any action with regard to any meat food product, poultry product, or other food subject to regulation under the Federal Meat Inspection Act, the Poultry Products Inspection Act, or the Federal Food, Drug, and Cosmetic Act that is inconsistent with the provisions of this Act.

H. R. 2521

Ninety-fifth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fourth day of January, one thousand nine hundred and seventy-seven

An Act

To provide for the mandatory inspection of domesticated rabbits slaughtered for human food, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, except as provided in section 2 of this Act all the penalties, terms, and other provisions in the Poultry Products Inspection Act (71 Stat. 441; 21 U.S.C. 451–470) are hereby made applicable (1) to domesticated rabbits, the carcasses of such rabbits, and parts and products thereof, and to the establishments in which domesticated rabbits are slaughtered or in which the carcasses, or parts or products thereof, are processed, (2) to all persons who slaughter domesticated rabbits or prepare or handle the carcasses of such rabbits or parts or products thereof, and (3) to all other persons who perform any act relating to domesticated rabbits or other carcasses of such rabbits or parts or products thereof, and who would be subject to such provisions if such acts related to poultry or the carcasses of poultry, or parts or products thereof; and such provisions shall apply in the same manner and to the same extent as such provisions apply with respect to poultry and the carcasses of poultry, and parts and products thereof, and to persons who perform acts relating to poultry, the carcasses of poultry, or parts or products thereof.

SEC. 2. (a) The provisions in paragraph (a)(2) of section 15, section 24(a), and section 29 of the Poultry Products Inspection Act shall not apply with respect to domesticated rabbits or the carcasses of such rabbits, or parts or products thereof. The two-year period specified in paragraph (c)(1) of section 5 of such Act and the periods contemplated by paragraph (c)(4) of such section shall commence upon the effective date hereof, with respect to domesticated rabbits and the carcasses of such rabbits, and parts and products thereof; and in applying the volume provisions in paragraphs (c)(3) and (c)(4) of section 15 of such Act, the volume restrictions applicable to poultry shall apply to domesticated rabbits.

(b) For purposes of this Act—

(1) wherever the term "poultry" is used in the Poultry Products Inspection Act, such term shall be deemed to refer to domesticated rabbits;

(2) wherever the term "poultry product" is used in the Poultry Products Inspection Act, such term shall be deemed to refer to domesticated rabbit products;

(3) the reference to "domesticated bird" in section 4(e) of the Poultry Products Inspection Act shall be deemed to refer to domesticated rabbit; and

(4) the reference to "feathers" in section 9(a)(4) shall be deemed to be "pelt".

SEC. 3. This Act shall become effective on October 1, 1978.

SEC. 4. The provisions hereof shall not in any way affect the application of the Poultry Products Inspection Act in relation to poultry, poultry carcasses, and parts and products thereof.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

The bill's definition of domestic violence will determine whether an individual receives services. It is understood that the violence must be committed in the context of a spousal or spousal-seeming relationship, and by an individual against one of the opposite gender. In each of the cases that follow, it is assumed that if the sexes were reversed, the answer would be the same.

		Yes	No
Case 1:	A man and woman, both married but not to each other, are living together. The man beats up the woman. Is the woman eligible for services?	x	
Case 2:	Same as case 1, except that the husband of the woman living with the man finds and beats up the woman. Is the woman eligible?	x	
Case 3:	Same as case 1, except that the wife of the man who is living with the woman finds the man at which point the man (her husband) beats her up. Is the wife eligible?	x	
Case 4:	Same as case 1, except that the husband returns home from time to time to beat up his wife. Is the wife eligible?	x	
Case 5:	A man of no fixed address keeps some clothes in a woman's apartment and visits her there once or twice a week for sexual and other purposes. Is she eligible?	x	
Case 6:	Same as case 5, except that it is the man's apartment, and the woman stays there perhaps once or twice a week. He beats up the woman. Is she eligible?	x	
Case 7:	A man and woman are brother and sister living in an incestuous relationship. The brother beats up the sister. Is she eligible?		x
Case 8:	A man and woman go to a hotel room for the purpose of sex, and the man beats up the woman. Is the woman eligible?		x
Case 9:	A man hurls oral abuse at his wife. She suffers a nervous breakdown. Is she eligible?		x
Case 10:	A man threatens to kill his wife, but does not touch her. Is she eligible?	x	
Case 11:	A man beats up his children. His wife leaves with the children in order to protect them (she, herself, not having been abused). Are either she or the children eligible?		x
Case 12:	A man is living with two women and beats them both up? Are they both eligible for services?	x	

TABULATION OF DEFINITION OF DOMESTIC VIOLENCE

The term "domestic violence" means

(A) the threat or
(B) infliction of

physical injury upon an individual by one

(1) to whom that individual

(A) is or
(B) has been

married, or

(2) with whom that individual

(A) is or
(B) has been

living;

except that the term does not include

(A) a threat or
(B) infliction

of injury by an individual

(A) upon another of the same sex, or [by an individual]
(B) to whom the threatened or injured individual bears a relationship described in paragraphs (1) through (8) of 26 U.S.C. 152(a); and

except that the term does not include an injury not the result of physical abuse.

CONTENTS OF STATE PLANS

SEC. 602. To be approved under this Act a State mental health services plan must be submitted in such form and manner as the Secretary prescribes and must—

(1) identify the mental health services areas within the State, which areas must cover the entire State and each of which must, except to the extent and in the cases permitted by the Secretary (including exceptions made for interstate areas), have boundaries which conform to or are within the boundaries of a health service area established under title XV of the Public Health Service Act and, to the extent practicable, conform to boundaries of one or more school districts or political or other subdivisions in the State;

(2) set forth (A) the need of each mental health services area in the State for mental health services, as determined after consideration of all relevant matters, including the demographic, economic, or social characteristics of the population of the area, with special attention to the need of priority population groups for services as well as to the need for services and activities designed to prevent mental illness from occurring, (B) the public or private facilities, mental health personnel, and services available, and the additional facilities, personnel, and services required, to meet those

needs, (C) the methods used to determine those needs and evaluate the facilities, personnel, and services, (D) the way in which and the order in which those needs will be met through use of existing Federal, State, or local resources and otherwise, and (E) similar information for the State not included under clause (A), (B), (C), or (D) which is of significance for more than a single mental health services area;

(3) provide for establishment or designation of a single agency of the State (in this Act referred to as the "State Agency") to assume responsibility for administration of the plan and the other aspects of the State's mental health services program and include, in the methods of administration of the plan, methods relating to establishment and maintenance of personnel standards on a merit basis which are in accord with standards prescribed by the Office of Personnel Management;

(4) identify each Area Mental Health Authority which has been designated by the State Agency and the mental health services area or areas it serves;

(5) include or be accompanied by (A) documentation and other evidence showing that, in the process of its development and before the plan was submitted to the Secretary, a reasonable opportunity was afforded to

interested agencies, organizations, and individuals to present their views and to comment on the proposed plan; and (B) satisfactory assurances that, after submission of the proposed plan to the Secretary and its approval by him, a reasonable opportunity will be afforded to interested agencies, organizations, and individuals to comment on administration of the plan and on any proposed modification of the plan;

(6) describe the steps that are proposed to be taken at the State level and the local level in an effort, which the Secretary determines to be reasonable (A) to coordinate the provision of mental health services, and (B) to coordinate, in the case of the chronically mentally ill and any other priority population group designated by the Secretary, the various kinds of services for members of such groups who need both mental health services and support services;

(7) describe the legal rights of persons in the State who are mentally ill or otherwise mentally handicapped and what is being done in the State to protect those rights;

(8) provide for emphasizing outpatient mental health services for patients instead of institutional inpatient treatment wherever appropriate and include fair and equitable arrangements (as determined by the Sec-

retary after consultation with the Secretary of Labor) to protect the interests of employees affected adversely by actions taken to emphasize such outpatient treatment, including arrangements designed to preserve employee rights and benefits and to provide training and retraining of such employees, where necessary, for work in mental health or other fields and including arrangements under which maximum effort will be made to place such employees in employment;

(9) provide that any statistics or other data included in the State plan or on which the State plan is based will conform to such criteria, standards, and other requirements relating to their form, method of collection, content, or other aspects as the Secretary prescribes in order to provide Nationwide comparability of the data;

(10) provide that the State Agency will make such reports, in such form and containing such information, and keep such records as the Secretary may require, and afford such access to those records as the Secretary may find necessary to assure the correctness of and to verify such reports;

(11)(A) provide that an agency of the State designated by the Governor will from time to time, and in any event not less often than triennially, review the in-

formation and other material in or accompanying the State plan, as well as the proposed objectives of or activities under the plan, and submit to the Secretary through the Governor any necessary modifications thereof, except to the extent excused by the Secretary because the modifications are of minor significance; and

(B) provide that an agency of the State designated by the Governor will submit to the Secretary through the Governor any other modifications in the plan or in such information, material, objectives, or activities that are necessary for any other reason, except to the extent so excused by the Secretary; and

(12) contain or be accompanied by such additional information or assurances and meet such other requirements as the Secretary prescribes in order to achieve the purposes of this Act.

A B I L L

To provide Federal assistance to States and other entities for programs to prevent domestic violence and assist its victims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Domestic Violence Prevention Act".

Findings and Purpose

Sec. 2. (a) The Congress finds that a substantial number of adults, particularly adult women, are beaten or otherwise injured by their spouses; that this domestic violence constitutes a significant proportion of the homicides, aggravated assaults, and assaults and batteries in the United States; that the effectiveness of State laws, and State and local community programs, in identifying, preventing, and treating this domestic violence is unknown; and that no existing Federal program materially contributes to solving the problem presented by domestic violence.

(b) It is the purpose of this Act --

(1) to provide emergency shelter, protection, and other services, to victims of domestic violence;

(2) to develop methods and conduct activities for preventing or reducing the incidence of domestic violence; and

(3) to evaluate the effectiveness of activities relating to domestic violence.

Definitions

Sec. 3. As used in this Act --

(1) The term "domestic violence" means the threat or infliction of physical injury upon an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include a threat or infliction of injury by an individual upon another of the same sex, or by an individual to whom the threatened or injured individual bears a relationship described in paragraphs (1) through (8) of 26 U.S.C. 152(a); and except that the term does not include an injury that is not the result of physical abuse.

(2) The term "services to victims of domestic violence" includes the provision of shelter (not to exceed 30 days in any fiscal year), pertinent counseling, and emergency medical treatment for traumatic injuries, to a victim of domestic violence; the provision of shelter to her minor children during any period in which she is receiving shelter; and the provision of pertinent counseling to the individual who has subjected her to that violence. The term does not include the provision of cash payments to those victims.

(3) The term "activities relating to domestic violence" includes the minor remodeling of facilities to enable them to be used as temporary shelters.

(4) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(5) The terms "State" and "States" include the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(6) A word importing the feminine gender includes the masculine as well.

Authorization of Appropriations

Sec. 4. (a) For the purpose of carrying out this Act, there are authorized to be appropriated $20,000,000 for fiscal year 1980, and such sums as may be necessary for each of the two succeeding fiscal years.

(b) From the sums appropriated for a fiscal year under subsection (a), the Secretary shall reserve an amount, equal to not less than one percent and not more than three percent of those sums for that year, to carry out the functions specified by section 10 (pertaining to evaluations and reports). Of the remainder, 75 percent is available to the Secretary to carry out the program of State grants for services established by section 5 and the balance (in addition to amounts, if any, available under section 5(b)) is available to the

Secretary to carry out the program of research and demonstration projects established by section 7.

State Grants for Services

Sec. 5. (a)(1) From the sums available under section 4(b) for carrying out the program of State grants for services, the Secretary shall pay to each State for a fiscal year an amount equal to 75 percent of its expenditures under a plan of the State approved by the Secretary under section 6, but not in excess of the State's allotment computed under paragraph (2) or (3) of this subsection.

(2) From such available sums the Secretary shall first allot to each State the amount of $100,000. He shall then allot the remainder of those sums among the States in proportion to their populations, as determined on the basis of the most recent satisfactory data available from the Department of Commerce.

(3) If such available sums are insufficient to allot $100,000 to each State, the Secretary shall divide the available sums by the number of States and allot to each State an amount equal to the quotient of that division.

(b) If, upon the expiration of the eighth calendar month of the fiscal year, a State has not submitted to the Secretary a plan that complies with section 6, there is made available to the Secretary for the purpose of carrying out

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section 7 an additional amount equal to the allotment of that State under this section.

State Plan Requirements

Sec. 6. (a) The Secretary shall approve a plan of the State, for the purposes of section 5, if the plan --

(1) designates, or provides for the establishment of, a single State agency as the sole agency for administering or supervising the administration of the activities assisted under section 5;

(2) sets forth a State program plan, and the policies and procedures for its implementation, to achieve the objectives enumerated in section 2(b) by providing services to victims of domestic violence without regard to their incomes or resources, and by conducting other activities relating to domestic violence;

(3) includes, or is accompanied by (A) documentation and other evidence showing that, in the process of its development and before it was submitted to the Secretary, a reasonable opportunity was afforded to interested agencies, organizations, and individuals to present views and to comment on the proposed State program plan; and (B) satisfactory assurance that, after submission of the State program plan to the Secretary and its approval by him, a reasonable opportunity will be afforded to

interested individuals to contribute their services to its implementation;

(4) provides satisfactory assurance that --

(A) adequate measures will be taken to protect individuals from domestic violence while they are receiving shelter in accordance with the State program plan; and

(B) neither the identity nor whereabouts of an individual who is seeking, is receiving, or has received, services under the State program plan will be revealed to any person, except a public employee in need of the information in order to perform his official duties;

(5) sets forth policies and procedures to ensure that funds received under section 5 will (A) be used to supplement and, to the extent practical, increase the level of non-Federal funds that would otherwise be made available for the purposes for which funds under section 5 are provided, and (B) not be used to supplant those non-Federal funds;

(6) sets forth the means by which the State will assist and encourage grantees under the State program plan to obtain resources, other than those provided by this Act, for the conduct of activities related to domestic violence;

(7) describes the steps that are proposed to be taken, which the Secretary determines to be reasonable, to coordinate the provision of services under the State program plan with other services available within the State for victims of domestic violence, and with law enforcement agencies;

(8) establishes means for the evaluation of the effectiveness of services provided under the State program plan, and for reporting to the Secretary thereon and includes an assurance that a report will be made to the Secretary within 90 days following the close of the fiscal year for which a grant is awarded, summarizing the services assisted by the grant, and their effectiveness;

(9) provides that the State agency designated under paragraph (1) will make such reports, in such form and containing such information, and keep such records as the Secretary may require, and afford such access to those records as the Secretary or the Comptroller General of the United States may find necessary to assure the correctness of and to verify such reports; and

(10) contains or is accompanied by such additional information or assurances and meets such other require-

ments as the Secretary prescribes in order to achieve the purposes of this Act.

(b) Upon the request of a State made for good cause, the Secretary may waive compliance with any provision of subsection (a) if he determines that the waiver is consistent with achieving the purposes of this Act.

(c)(1) The Secretary shall not finally disapprove a State plan (or any modification thereof) except after reasonable notice and opportunity for a hearing to the State agency designated under subsection (a)(1).

(2) Whenever the Secretary, after reasonable notice and opportunity for a hearing to the State agency designated under subsection (a)(1), finds that the State plan approved under this Act has been so changed that it no longer complies with this Act, or that in the administration of the plan there is a failure to comply substantially with any provision of this Act, the Secretary shall notify the State agency that further payments will not be made to the State under the plan (or, in his discretion, that further payments will not be made to the State under the plan with respect to any project or activities affected by such failure), until he is satisfied that there will no longer be that failure. Until he is so satisfied, the Secretary shall make no further payments to the State under the plan or shall limit payments to projects or activities not affected by that failure.

Research and Demonstration Projects

Sec. 7. (a) From the amounts made available for the purpose under section 4(b), the Secretary may award grants to public or nonprofit private entities, or enter into contracts with private entities, which have applied therefor under section 8, for the conduct of activities relating to domestic violence, including --

(1) research into its causes, prevalance, and methods of preventing or ameloriating it;

(2) the evaluation, development, or demonstration of any such method, including the use of temporary shelters, counseling, emergency medical treatment for traumatic injury, and job referral or placement services;

(3) the collection, publication, or dissemination of information about domestic violence or services available with respect to it; and

(4) the training of individuals in activities relating to domestic violence.

(b) The Secretary shall not award a grant or contract under this section to provide for the payment of more than 80 percent of the cost of the activity for which it is awarded, except that Secretary, in response to a request under section 8(a)(3), may waive all or part of this limitation for the first year in which he assists an activity under this section.

(c) The Secretary shall give preference, in the award of grants or contracts under this section, to activities for the development of methods of reducing domestic violence that are both new and promise to be unsually effective.

(d) No amount available for this section may be used for cash payments as assistance to victims of domestic violence.

(e) The Secretary shall not award a grant to, or enter into a contract with, an entity, to assist that entity to conduct an activity for a fiscal year, if that entity has received assistance under this section for that activity for three previous fiscal years.

Application for Project Grant or Contract

Sec. 8. (a) To be eligible to receive a grant from, or enter into a contract with, the Secretary under section 7 for assistance for an activity, an applicant for that grant or contract must file with the Secretary, upon such terms and conditions as the Secretary may prescribe, an application that contains, in addition to such other information or assurances that the Secretary may require --

(1) the assurances described by section 6(a)(4) (pertaining to protection and confidentiality), and the means and assurances described by section 6(a)(8) (pertaining to evaluation of effectiveness), insofar as applicable to the activity;

(2) if the applicant is an agency of a State (or political subdivision) that has designated a State agency under section 6(a)(1), a certification by the State agency that the application is consistent with activities under the State plan submitted under section 6;

(3) if the applicant seeks a waiver under section 7(b) of its share of the activity's cost, an explanation of the need for that waiver; and

(4) for that portion of the activity's cost for which the applicant does not seek a waiver under section 7(b) (and, in a supplement to the application, for any portion of the cost that is not so waived), evidence that cash is available to pay that portion of the activity's cost for which the applicant does not receive assistance under section 7, except that the applicant may substitute for cash the equivalent value (determined under the Secretary's regulations) of real property (including a leasehold).

Administration

Cooperative agreements authorized

Sec. 9. (a) In any case in which the Secretary is authorized to make a grant to an entity under section 7, he may instead enter into a cooperative agreement with that entity under which he will make the same payments, on the

same terms, for the activity as he would under a grant therefor, but only on condition that the entity complies with the requirements of this Act to the same extent as would be required of an applicant for or recipient of a grant for the same purpose.

Advance payment of grants

(b) The Secretary may pay the amount of any grant or cooperative agreement under this Act in advance or by way of reimbursement.

Waiver of certain requirements applicable to contracts

(c) The Secretary may enter into a contract under section 7 of this Act without regard to sections 3648 and 3709 of the Revised States (31 U.S.C. 529; 41 U.S.C. 5) (pertaining to advance payments and advertised bids).

Grants to Federal agencies

(d)(1) Amounts available under section 7 are available for grants to, or cooperative agreements with, Federal agencies or institutions for the same purposes, and on the same terms and conditions, as apply to grants to other entities under that section, except that grants to Federal agencies or institutions may be for the entire cost of the activity for which they are awarded.

(2) Notwithstanding any provision of law, a Federal agency may apply for, receive, and use a grant under section

7 for any purpose (consistent with that section) for which it is otherwise authorized to use appropriated funds.

Technical Assistance

(e) The Secretary may provide technical assistance to a grantee, contractor, or applicant for a grant or contract under this Act, to the extent consistent with any purpose set forth in section 2(b).

Evaluation and Reports

Sec. 10. (a) The Secretary shall use the amounts reserved for the purpose under section 4(b) to evaluate the administration of this Act, and to submit the reports required by subsection (b). The Secretary shall not employ, to conduct that evaluation or prepare those reports, an individual who has been engaged in the administration of this Act.

(b) The Secretary shall submit to the President, and to each House of Congress --

(1) within 90 days following the close of each fiscal year for which this Act is effective, a report of the evaluation of the Act's administration during that year; and

(2) within 90 days following the close of the third fiscal year for which this Act is effective, a report (in addition to the report required by paragraph (1) for that year) of the evaluation of the Act's

administration for the three fiscal years for which the Act has been in effect.

(c)(1) The Secretary shall include in each report submitted under subsection (b) --

(A) an evaluation of the effectiveness of this Act in preventing or reducing domestic violence, and providing services to its victims;

(B) a survey of domestic violence programs, with an estimate of the number and type of such programs the existence of which are attributable to assistance under this Act;

(C) an estimate of the number and type of programs assisted under this Act that have become, or are expected to become, independent of the need for that assistance; and

(D) an analysis of the types of information on domestic violence developed under this Act and the extent of its dissemination.

(2) The Secretary shall include in the report required by subsection (b)(2) his recommendations regarding the desirability of extending this Act beyond the expiration date provided by section 4(a).

Reauthorization of Program

Sec. 11. (a) It is not in order in either the Senate or the House of Representatives to consider any bill or resolution, or amendment thereto, that authorizes the enactment of new budget authority for this Act for any fiscal year after fiscal year 1982.

(b) The Secretary may not obligate budget authority under this Act for a fiscal year beginning after fiscal year 1982.

SPECIFICATIONS FOR AMENDMENTS TO DOMESTIC VIOLENCE PREVENTION ACT

1. Extend the appropriations' authorization through fiscal year 1985, authorizing such sums as may be necessary to carry out the program.

2. Allow the use of appropriations for activities to prevent child abuse or assist its victims, if the abuse is physical injury to, or sexual abuse of, a child under the age of 16 by a parent, guardian, or other adult relative with whom the child is living.

3. Require that the state plan limit to 15 percent of the state grant any amounts to be used under the assisted program in connection with child abuse activities.

4. Limit to 15% of the amounts used for grants and contracts for research or demonstration projects, amounts directed against child abuse.

5. Change references to the Secretary of Health, Education, and Welfare to references to the Secretary of Health and Human Services.

6. Amend the statement of purpose to recognize the child abuse problem.

7. Amendments are to be effective with respect to appropriations for fiscal years after FY 1982.

DRAFTING OUTLINE

1. §2(a): Amend to express concern for child abuse.

2. §3(1): Expand definition of domestic violence to include child abuse.

3. Insert after §3(1) a definition of "child abuse".

4. §3(4): Redefine Secy. of HEW to be Secy. of HSS.

5. Redesignate §§3(2) through 3(6) to be §§3(3) through 3(7).

6. §4(a): Amend "two succeeding fiscal years" to read "five succeeding fiscal years".

7. §6(a): Add a new paragraph to limit use of funds related to child abuse to 15%.

8. §6(b): Amend to bar waiver of 15% limitation on child abuse funding.

9. §7(b): Amend to bar the Secretary from awarding more than 15% of R&D funds for activities related to child abuse. (Allow Secy. to pro-rate between adults & children in a project relating to both.)

10. §8: Add a ¶(5) to require an applicant's filed budget to show amount allocated for child abuse activities if project involves both adults and children.

11. §§11(a) and (b): Extend sunset from "1982" to "1985".

Coverage of Employees of Foreign Subsidiaries of American Employers: Elimination of Requirement that American Employer be a Corporation

Sec. 127. (a) Section 210(a) of the Social Security Act is amended in the matter preceding paragraph (1) by striking out "of a domestic corporation (as determined in accordance with section 7701 of the Internal Revenue Code of 1954)" and inserting instead "of an American employer (as defined in subsection (e))".

(b)(1) Section 3121(ℓ) of the Internal Revenue Code of 1954 is amended --

(A) in its side-heading, by striking out "domestic corporations" and inserting "American employers" instead,

(B) in paragraph (1) --

(i) in the matter preceding subparagraph (A) --

(I) by striking out "any domestic corporation" and inserting "any American employer (as defined in subsection (h))" instead,

(II) by striking out "such corporation" and inserting "such employer" instead, and

(III) by striking out "such domestic corporation" and inserting "such American employer" instead, and

(ii) in subparagraphs (A) and (B), by striking out "the domestic corporation" each time it appears and inserting "the American employer" instead, and

(C) in paragraphs (2) through (8) (including their side-headings), by striking out "domestic corporation" and inserting "American employer" instead,

(D) in paragraph (9), (1) by striking out "Domestic corporation" in the side-heading and inserting "American employer" instead, and (2) by striking out "Each domestic corporation" and inserting "Each American employer" instead, and

(E) in paragraph (10), by striking out "on domestic corporations" and inserting "on American employers" instead.

(2) Section 6413(c)(2)(C) of the Code is amended by striking out "domestic corporation" and inserting instead "American employer".

(3) Section 1402(b) of the Code is amended by striking out "domestic corporations" and inserting instead "American employers".

(4) Section 406 of the Code is amended --

(A) in the side-heading of subsection (a), by striking out "domestic corporation" and inserting instead "American employer",

(B) in subsection (a), by striking out "a domestic corporation" and inserting instead "an American employer (as defined in section 3121(h))",

(C) in the remaining subsections, by striking out "a domestic corporation" wherever it may appear and inserting instead "an American employer",

(D) by striking out "such domestic corporation" and "the domestic corporation", wherever they may appear, and inserting instead "such American Employer" and "the American employer", respectively,

(E) in subsection (c)(3), by striking out "another corporation" and inserting instead "another trade or business", and

(F) in subsection (d) --

(i) in the matter preceding paragraph (1), by striking out "another corporation" and inserting instead "a corporation", and

(ii) in paragraph (1), by striking out "any other corporation" and inserting instead "any other trade or business".

(c) The preceding subsections of this section are effective with respect to quarters beginning after December 31, 1980.

Coverage of Employees of Foreign Subsidiaries of American Employers: Foreign Employer may be an Unincorporated Affiliate; Ownership Requirement Reduced

Sec. 128. (a) Section 210(a) of the Social Security Act, as amended by section 127 of this Act, is further amended in the matter preceding paragraph (1) by striking out "subsidiary" wherever it appears and inserting "affiliate" instead.

(b)(1) Section 3121(ℓ)(8) of the Internal Revenue Code of 1954 is amended --

(A) in subparagraph (A), by striking "corporation not less than 20 percent of the voting stock" and inserting instead "trade or business not less than 10 percent",

(B) in subparagraph (B), by amending the text to read "a foregin trade or business that is owned by a foreign trade or business described in subparagraph (A), if the percentage of that ownership, when multiplied by the actual ownership percentage determined under that subparagraph, is not less than 10 percent.", and

(C) in the matter preceding subparagraph (A), by striking out "subsidiary" in the text and sideheading and inserting "affiliate" instead.

(2)(A) Section 3121(ℓ) of the Code (other than paragraph (8)) is amended by striking out "subsidiary" and

"subsidiaries" wherever they may appear in the text or side-headings and inserting instead "affiliate" and "affiliates", respectively.

(B) Paragraphs (3) and (9) of sections 3121( ) are each amended by striking out "foreign corporation" and "foreign corporations" each time they appear and inserting instead "foreign trade or business" and "foreign trades or businesses", respectively.

(3) Sections 6413 (c)(2) and 6413(c)(2)(C) of that Code are each amended by striking out "foreign corporations" in the side-heading and inserting "foreign trades or business" instead.

(4) Section 1402(b) of that Code is amended by striking out "subsidiaries" and inserting "affiliates" instead.

(5) Section 406 (including its caption) of the Code is amended by striking out "foreign subsidiaries" and "foreign subsidiary" wherever they may appear and inserting instead "foreign affiliates" and "foreign affiliate", respectively.

(c) The preceding subsections of this section are effective with respect to quarters beginning after December 31, 1980.

OUTLINE OF DOMESTIC VIOLENCE PREVENTION AMENDMENTS OF 1982

Short Title

§1 (DVPA of 1982)

Expansion of Programs to Include Child Abuse Prevention and Treatment Activities

§2(a) State plan program.

(1) (Amendment of §6(a))

(2) (Amendment of §6(b))

(b) Research and demonstration projects

(1) (Amendment of §7(b))

(2) (Addition of ¶5 to §8)

(c) Definitions.

(1) (Amendment of §3(1))

(2) (Addition of child abuse definition as new §3(2))

(d) Statement of purpose. (Amendment of §2(a))

Extension of Appropriations Authorization

§3 (Amendment of §4(a))

Technical and Conforming Amendments

§4(a) (Amendment of §3(4))

(b) (Amendment of §§11(a) and (b))

Effective Date

§5 (Effective with respect to appropriations for FY 1983 and thereafter)

A B I L L

To amend the Domestic Violence Prevention Act to authorize appropriations to carry out the Act for an additional three years, to expand its programs to include activities to prevent child abuse and assist its victims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Domestic Violence Prevention Amendments of 1982".

Expansion of Programs to Include Child Abuse Prevention and Treatment Activities

Sec. 2. (a) State plan program. --

(1) Section 6(a) of the Domestic Violence Prevention Act is amended --

(A) by redesignating paragraphs (3) through (10) as paragraphs (4) through (11), respectively, and

(B) by adding after paragraph (2) the following new paragraph:

"(3) provides satisfactory assurance that no more than 15 percent of the amounts expended under the plan for a fiscal year will be for activities related to child abuse;".

(2) Section 6(b) of that Act is amended by inserting ", except paragraph (3)," immediately after "subsection (a)".

(b) Research and demonstration projects. --

(1) Section 7 of that Act is amended (A) by redesignating subsection (b) as subsection (b)(1) and (B) by adding at the end of subsection (b) the following new paragraph:

"(2) Not more than 15 percent of the sum of the amounts awarded for grants and contracts under this section may be used for activities directed at problems of child abuse. In the case of a grant or contract for an activity that is in part directed at a problem of child abuse, the Secretary shall take into account only that part for purposes of the preceding sentence.

(2) Section 8 of that Act is amended (A) in paragraph (3), by striking out "and" at the end thereof, (B) in paragraph (4), by striking out the period at the end thereof and inserting instead "; and", and (C) by adding at the end of that section the following new paragraph:

"(5) in the case of an activity a portion of which is directed at a problem of child abuse, a budget for the activity that sets forth the amount of the grant or contract that will be used for that portion."

(c) Definition. --

(1) Paragraphs (2) through (6) of section 3 of that Act are redesignated as paragraphs (3) through (7) and there is added immediately after paragraph (1) the following new paragraph:

"(2) The term "child abuse" means the infliction of physical injury on, or the sexual abuse of, a child under the age of 16 by the child's parent, guardian, or other adult relative with whom the child is living."

(2) Paragraph (1) of section 3 of that Act is amended to read as follows:

"(1) The term "domestic violence" means --

"(A) the threat or infliction of physical injury upon an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include a threat or infliction of injury by an individual upon another of the same sex, or by an individual to whom the threatened or injured individual bears a relationship described in paragraphs (1) through (8) of 26 U.S.C. 152(a); and except that the term does not include an injury that is not the result of physical abuse; or

"(B) child abuse as defined in paragraph (2)."

(d) Statement of purpose. -- The text of section 2(a) of that Act is amended to read as follows: "The Congress finds both that a substantial number of adults, particularly adult women, are beaten or otherwise injured by their spouses, and that a substantial number of children are physically or sexually abused by their parents or guardians; that this domestic violence constitutes a significant proportion of the homicides, aggravated assaults, assaults and batteries and, in the case of children, sexual crimes, in the United States; that the effectiveness of State laws and State and local community programs in identifying, preventing and treating this domestic violence is unknown; and that existing Federal programs are not adequate to solve the problem presented by domestic violence."

Extension of Appropriations Authorization

Sec. 3. Section 4(a) of the Domestic Violence Prevention Act is amended by striking out "two succeeding fiscal years" and inserting instead "five succeeding fiscal years".

Technical and Conforming Amendments

Sec. 4. (a) Section 3(4) of the Domestic Violence Prevention Act is amended by striking out "Health, Education, and Welfare" and inserting instead "Health and Human Services".

(b) Subsections (a) and (b) of section 11 of that Act are each amended by striking out "1982" and inserting instead "1985".

Effective Date

Sec. 5. This Act is effective with respect to appropriations under section 4(a) for fiscal years beginning after fiscal year 1982.

TITLE II—EFFECTIVE DATE, TRANSITIONAL PROVISIONS, AND EFFECT ON OTHER LAWS

DEFINITIONS

SEC. 201. As used in this title, the term "basic Act" means the Federal Food, Drug, and Cosmetic Act; the term "enactment date" means the date of enactment of this Act; and other terms, insofar as also used in the basic Act (whether before or after enactment of this Act) shall have the same meaning as they have, or had when in effect, under the basic Act.

EFFECTIVE DATE

SEC. 202. This Act shall, subject to the provisions of section 203, take effect on the enactment date.

PROVISIONAL LISTINGS OF COMMERCIALLY ESTABLISHED COLORS

SEC. 203. (a) (1) The purpose of this section is to make possible, on an interim basis for a reasonable period, through provisional listings, the use of commercially established color additives to the extent consistent with the public health, pending the completion of the scientific investigations needed as a basis for making determinations as to listing of such additives under the basic Act as amended by this Act. A provisional listing (including a deemed provisional listing) of a color additive under this section for any use shall, unless sooner terminated or expiring under the provisions of this section, expire (A) on the closing date (as defined in paragraph (2) of this subsection) or (B) on the effective date of a listing of such additive for such use under section 706 of the basic Act, whichever date first occurs.

52 Stat. 1058.
21 USC 376.

(2) For the purposes of this section, the term "closing date" means (A) the last day of the two and one-half year period beginning on the enactment date or (B), with respect to a particular provisional listing (or deemed provisional listing) of a color additive or use thereof, such later closing date as the Secretary may from time to time establish pursuant to the authority of this paragraph. The Secretary may by regulation, upon application of an interested person or on his own initiative, from time to time postpone the original closing date with respect to a provisional listing (or deemed provisional listing) under this section of a specified color additive, or of a specified use or uses of such additive, for such period or periods as he finds necessary to carry out the purpose of this section, if in the Secretary's judgment such action is consistent with the objective of carrying to completion in good faith, as soon as reasonably practicable, the scientific investigations necessary for making a determination as to listing such additive, or such specified use or uses thereof, under section 706 of the basic Act. The Secretary may terminate a postponement of the closing date at any time if he finds that such postponement should not have been granted, or that by reason of a change in circumstances the basis for such postponement no longer exists, or that there has been a failure to comply with a requirement for submission of progress reports or with other conditions attached to such postponement.

(b) Subject to the other provisions of this section—

(1) any color additive which, on the day preceding the enactment date, was listed and certifiable for any use or uses under section 406(b), 504, or 604, or under the third proviso of section 402(c), of the basic Act, and of which a batch or batches had been certified for such use or uses prior to the enactment date, and 52 Stat. 1049, 1052, 1055, 1047. 21 USC 346, 354, 364, 342.

(2) any color additive which was commercially used or sold prior to the enactment date for any use or uses in or on any food, drug, or cosmetic, and which either, (A), on the day preceding the enactment date, was not a material within the purview of any of the provisions of the basic Act enumerated in paragraph (1) of this subsection, or (B) is the color additive known as synthetic beta-carotene,

shall, beginning on the enactment date, be deemed to be provisionally listed under this section as a color additive for such use or uses.

(c) Upon request of any person, the Secretary, by regulations issued under subsection (d), shall without delay, if on the basis of the data before him he deems such action consistent with the protection of the public health, provisionally list a material as a color additive for any use for which it was listed, and for which a batch or batches of such material had been certified, under section 406(b), 504, or 604 of the basic Act prior to the enactment date, although such color was no longer listed and certifiable for such use under such sections on the day preceding the enactment date. Such provisional listing shall take effect on the date of publication.

(d)(1) The Secretary shall, by regulations issued or amended from time to time under this section—

(A) insofar as practicable promulgate and keep current a list or lists of the color additives, and of the particular uses thereof, which he finds are deemed provisionally listed under subsection (b), and the presence of a color additive on such a list with respect to a particular use shall, in any proceeding under the basic Act, be conclusive evidence that such provisional listing is in effect;

(B) provide for the provisional listing of the color additives and particular uses thereof specified in subsection (c);

(C) provide, with respect to particular uses for which color additives are or are deemed to be provisionally listed, such temporary tolerance limitations (including such limitations at zero level) and other conditions of use and labeling or packaging requirements, if any, as in his judgment are necessary to protect the public health pending listing under section 706 of the basic Act; 52 Stat. 1058. 21 USC 376.

(D) provide for the certification of batches of such color additives (with or without diluents) for the uses for which they are so listed or deemed to be listed under this section, except that such an additive which is a color additive deemed provisionally listed under subsection (b)(2) of this section shall be deemed exempt from the requirement of such certification while not subject to a tolerance limitation; and

(E) provide for the termination of a provisional listing (or deemed provisional listing) of a color additive or particular use thereof forthwith whenever in his judgment such action is necessary to protect the public health.

(2)(A) Except as provided in subparagraph (C) of this paragraph, regulations under this section shall, from time to time, be issued, amended, or repealed by the Secretary without regard to the requirements of the basic Act, but for the purposes of the application of section 706(e) of the basic Act (relating to fees) and of determining the availability of appropriations of fees (and of advance deposits

to cover fees), proceedings, regulations, and certifications under this section shall be deemed to be proceedings, regulations, and certifications under such section 706. Regulations providing for fees (and advance deposits to cover fees), which on the day preceding the enactment date were in effect pursuant to section 706 of the basic Act, shall be deemed to be regulations under such section 706 as amended by this Act, and appropriations of fees (and advance deposits) available for the purposes specified in such section 706 as in effect prior to the enactment date shall be available for the purposes specified in such section 706 as so amended.

(B) If the Secretary, by regulation—

(i) has terminated a provisional listing (or deemed provisional listing) of a color additive or particular use thereof pursuant to paragraph (1)(E) of this subsection; or

(ii) has, pursuant to paragraph (1)(C) or paragraph (3) of this subsection, initially established or rendered more restrictive a tolerance limitation or other restriction or requirement with respect to a provisional listing (or deemed provisional listing) which listing had become effective prior to such action,

any person adversely affected by such action may, prior to the expiration of the period specified in clause (A) of subsection (a)(2) of this section, file with the Secretary a petition for amendment of such regulation so as to revoke or modify such action of the Secretary, but the filing of such petition shall not operate to stay or suspend the effectiveness of such action. Such petition shall, in accordance with regulations, set forth the proposed amendment and shall contain data (or refer to data which are before the Secretary or of which he will take official notice), which show that the revocation or modification proposed is consistent with the protection of the public health. The Secretary shall, after publishing such proposal and affording all interested persons an opportunity to present their views thereon orally or in writing, act upon such proposal by published order.

(C) Any person adversely affected by an order entered under subparagraph (B) of this paragraph may, within thirty days after its publication, file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating reasonable grounds for such objections, and requesting a public hearing upon such objections. The Secretary shall hold a public hearing on such objections and shall, on the basis of the evidence adduced at such hearing, act on such objections by published order. Such order may reinstate a terminated provisional listing, or increase or dispense with a previously established temporary tolerance limitation, or make less restrictive any other limitation established by him under paragraph (1) or (3) of this subsection, only if in his judgment the evidence so adduced shows that such action will be consistent with the protection of the public health. An order entered under this subparagraph shall be subject to judicial review in accordance with section 701(f) of the basic Act except that the findings and order of the Secretary shall be sustained only if based upon a fair evaluation of the entire record at such hearing. No stay or suspension of such order shall be ordered by the court pending conclusion of such judicial review.

52 Stat. 1055.
21 USC 371.

(D) On and after the enactment date, regulations, provisional listings, and certifications (or exemptions from certification) in effect under this section shall, for the purpose of determining whether an article is adulterated or misbranded within the meaning of the basic Act by reason of its being, bearing, or containing a color additive, have the same effect as would regulations, listings, and certifications (or exemptions from certification) under section 706 of the basic Act.

A regulation, provisional listing or termination thereof, tolerance limitation, or certification or exemption therefrom, under this section shall not be the basis for any presumption or inference in any proceeding under section 706 (b) or (c) of the basic Act.

(3) For the purpose of enabling the Secretary to carry out his functions under paragraphs (1) (A) and (C) of this subsection with respect to color additives deemed provisionally listed, he shall, as soon as practicable after enactment of this Act, afford by public notice a reasonable opportunity to interested persons to submit data relevant thereto. If the data so submitted or otherwise before him do not, in his judgment, establish a reliable basis for including such a color additive or particular use or uses thereof in a list or lists promulgated under paragraph (1) (A), or for determining the prevailing level or levels of use thereof prior to the enactment date with a view to prescribing a temporary tolerance or tolerances for such use or uses under paragraph (1) (C), the Secretary shall establish a temporary tolerance limitation at zero level for such use or uses until such time as he finds that it would not be inconsistent with the protection of the public health to increase or dispense with such temporary tolerance limitation.

EFFECT ON MEAT INSPECTION AND POULTRY PRODUCTS INSPECTION ACTS

SEC. 204. Nothing in this Act shall be construed to exempt any meat or meat food product, poultry or poultry product, or any person from any requirement imposed by or pursuant to the Meat Inspection Act of March 4, 1907, 34 Stat. 1260, as amended or extended (21 U.S.C. 71 and the following), or the Poultry Products Inspection Act (21 U.S.C. 451 and the following). 71 Stat. 441.

Approved July 12, 1960.

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